NO. 86 1815

Supreme Court, U.S.
FILED
MAY 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

CREDIT BUREAU SERVICES-NEW ORLEANS, D/B/A CHILTON CORPORATION,

Petitioner,

VERSUS

THOMAS K. PINNER,

Respondent.

PETITION OF CREDIT BUREAU SERVICE-NEW ORLEANS, D/B/A CHILTON CORPORATION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HARRY A. ROSENBERG
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
Thirtieth Floor, Texaco Center
400 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 566-1311

ATTORNEYS FOR PETITIONER, CREDIT BUREAU SERVICE-NEW ORLEANS, D/B/A CHILTON CORPORATION

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

(1) Can a consumer credit reporting agency be held liable under the Fair Credit Reporting Act, 15 U.S.C. §1681, *et seq.*, for dissemination of an accurate credit report?

(2) Is it permissible for the circuit court to expand the Fair Credit Reporting Act, 15 U.S.C. §1681, *et seq.*, by requiring a consumer credit reporting agency to conduct an independent investigation of a disputed credit report besides verifying the accuracy of the information in the report?

(3) Is it reasonable for a consumer credit reporting agency to contact the creditor to verify credit information reported by that creditor when that account has been questioned by the debtor, as established by the Fair Credit Reporting Act, 15 U.S.C., §1681, *et seq.*?

DESIGNATED LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT BELOW

(1) Thomas K. Pinner

(2) James J. Schmidt

(3) Sherwin-Williams Company

(4) Credit Bureau Services-New Orleans, d/b/a Chilton Corporation[1]

---

[1] Borg-Warner Corporation is the parent company of Chilton Corporation; Borg-Warner Corporation is not a party to this proceeding.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW.....i

DESIGNATED LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT BELOW.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTIONAL STATEMENT.....1

STATUTES INVOLVED.....2

CONCISE STATEMENT OF THE CASE.....2

STATEMENT OF THE CASE.....4

STATEMENT OF FACTS.....5

REASONS FOR GRANTING THE PETITION.....15

(1) The Court Below Erroneously Found Liability Under the Fair Credit Reporting Act Notwithstanding the Fact that the Challenged Credit Report was Found to be Accurate.....16

(2) A Conflict Exists Among Circuit Courts as to the Accuracy Defense Under the Fair Credit Reporting Act.....18

(3) This Case Raises Important and Unresolved Questions as to What Constitutes Verification Under the FCRA.....21

(4) The Decision Below has Far-Reaching Ramifications on the Credit Reporting Industry and has the Effect of Rewriting the Fair Credit Reporting Act.....24

CONCLUSION.....25

TABLE OF CONTENTS (continued)

PAGE

APPENDIX A
Opinion of the Court of Appeals.....A-1

APPENDIX B
Opinion of the District Court.....A-24

APPENDIX C
Pertinent Statutory Provisions of the Fair Credit Reporting Act.....A-42

APPENDIX D
Credit Report Issued by Chilton Corporation on Thomas K. Pinner.....A-48

APPENDIX E
Federal Trade Commission's Interpretation of 15 U.S.C. §1681i.....A-51

TABLE OF AUTHORITIES

STATUTES PAGE

Fair Credit Billing Act, 15 U.S.C. §1666.....4

Fair Credit Reporting Act, 15 U.S.C. §1681, *et seq*.....*in passim*

15 U.S.C. §1681e(b).....19,20

15 U.S.C. §1681i..... ...10,14,22,24,26,

15 U.S.C. §1681i(a).....12,22,24,25

15 U.S.C. §1681i(b).....14,25

15 U.S.C. §1681s.....22

28 U.S.C. §1254(1).....1

28 U.S.C. §1441(b).....4

Louisiana Civil Code article 2315.....2,8

LEGISLATIVE HISTORY

House of Representatives Report No. 91-1587 (Conference Report to accompany H.R. 15073), 91st Cong., 2d Sess., 116 Cong. Rec S 17, 634-17, 637 (1970)

CASES

American Cyanamid Co. v. U.S. E.P.A., 810 F.2d 493 (5th Cir. 1987).....13

Austin v. Bank America Service Corp., 419 F.Supp. 730 (N.D. Ga. 1974).....18,20

Bryant v. TRW, Inc., 487 F.Supp. 1234, *aff'd*, 689 F.2d 72 (6th Cir. 1982).....13,18,19,21,23

TABLE OF AUTHORITIES (continued)

CASES **PAGE**

EPA v. National Crushed Stone Assoc., 449 U.S. 64 (1980).....12,13

Equifax, Inc. v. Federal Trade Commission, 678 F.2d 1047 (11th Cir. 1982).....11,12,20,21,

Koropoulos v. Credit Bureau, Inc., 734 F.2d 37 (D.C. Cir. 1984).....18,19,21

Lowry v. Credit Bureau, Inc. of Georgia, 444 F.Supp. 541 (N.D. Ga. 1978).....17,18

McPhee v. Chilton Corporation, 468 F.Supp. 494 (D. Conn. 1978).....17,18

Middlebrooks v. Retail Credit Co., 416 F.Supp. 1013 (N.D. Ga. 1976).....17,18

Morris v. Credit Bureau of Cincinnati, Inc., 563 F.Supp. 962 (S.D. Ohio 1983).....19

Peller v. Retail Credit Co., C.A. 17900, Dec. 6, 1973 (N.D. Ga.), *aff'd*, 505 F.2d 733 (5th Cir. 1974).....11,12,16,18,20,22

Pendleton v. Trans Union Systems Corp., 76 F.R.D. 192 (E.D. Pa. 1977).....18

Pinner v. Schmidt, 617 F.Supp. 342 (E.D. La. 1985) 805 F.2d 1258 (5th Cir. 1986).....2,4,7,14,17,21

Roseman v. Retail Credit Company, 428 F.Supp. 643 (E.D. Pa. 1977).....16,18

Stewart v. Credit Bureau, Inc., 734 F.2d 47 (D.C. Cir. 1984).....19

TABLE OF AUTHORITIES (continued)

CASES **PAGE**

Todd v. Associated Credit Bureau, 451 F.Supp. 447 (E.D. Pa. 1977), *aff'd*, 578 F.2d 1376 (3d Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979).....11,12,16 17,18,19,20,21

Wright v. TRW, 588 F.Supp. 112 (S.D. Fla. 1984).....11,16,17,18,20

NUMBER 87-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

CREDIT BUREAU SERVICES-NEW ORLEANS,
D/B/A CHILTON CORPORATION,
Petitioner,

VERSUS

THOMAS K. PINNER,
Respondent.

PETITION OF CREDIT BUREAU SERVICE-NEW ORLEANS, D/B/A CHILTON CORPORATION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 805 F.2d 1258 (5th Cir. 1986). The opinion of the District Court (Appendix B) is reported at 617 F.Supp. 342 (E.D. La. 1985).

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on December 18, 1986, and the denial of the Petition for Rehearing was entered on February 10, 1987. (See Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Fair Credit Reporting Act, 15 U.S.C. §1681*et seq.* (1970) is the only statute that is the subject of this petition. The pertinent provisions of the Fair Credit Reporting Act ("FCRA") are set forth in Appendix C, *infra.*

CONCISE STATEMENT OF THE CASE

In the district court, a jury rendered a verdict in favor of plaintiff, Thomas K. Pinner ("Pinner"), and against Chilton Corporation ("Chilton"), James J. Schmidt ("Schmidt"), and the Sherwin-Williams Company ("Sherwin-Williams"). The jury found all three defendants liable *in solido.* The Court of Appeals concluded that Pinner's claim against Sherwin-Williams and Schmidt was an action in defamation under state law. La. C.C. article 2315. Recognizing that truth bars a defamation action, and concomitantly finding that the credit information from Sherwin-Williams was true, the Court of Appeals held that Pinner's defamation claims were defeated by the defense of truth. 805 F.2d at 1264-65. Therefore, based upon the accuracy of Pinner's account with Sherwin-Williams, the circuit court vacated the defamation action against Schmidt and Sherwin-Williams and rendered judgment in their favor. But the Fifth Circuit erroneously failed to enter judgment in favor of Chilton. Rather, the circuit court mistakenly faulted Chilton for not deleting the accurate information reported by Sherwin-Williams -- a holding that is legislatively and jurisprudentially infirm under the Fair Credit Reporting Act.

The decision by the Fifth Circuit is contrary to the FCRA, is contrary to the legislative history of the Act, is contrary to the position of the Federal Trade Commission, and is in direct conflict with the rulings of the other federal courts that have construed the FCRA. The decision below, if not corrected, will create a devastating precedent that will wreak havoc within the credit reporting and credit

granting industry and will impair the ability of consumers to obtain credit.

If credit information is correct, and the circuit court concluded that the Sherwin-Williams credit information was truthful, the case law, until the ruling below, uniformly held that a credit reporting agency could not be held liable for reporting accurate information. Chilton requests this Court to correct the lower court's illogical deviation from this basic tenet under the Fair Credit Reporting Act, namely, that reporting accurate credit information cannot serve as a basis for imposing liability under the FCRA. The lower court's ruling forces Chilton to delete credit information unless it can independently prove the accuracy of Pinner's data. Pretermitting the accuracy of the credit report, the FCRA does not require Chilton to perform an independent investigation to verify credit data. To force a credit reporting agency either to conduct an independent investigation of credit data or to purge accurate data from the consumer's credit history would paralyze credit grantors. The result of this unprecedented procedure conjured up by the Fifth Circuit would deprive consumer credit to the people who need it most.

The Fifth Circuit summarily rejected Pinner's claim that Sherwin-Williams communicated false information to Chilton. Based upon the truthfulness of this data, the court correctly concluded that liability could not be imposed upon Sherwin-Williams or Schmidt. This determination by the Fifth Circuit *a fortiori* precludes imposing liability against Chilton under the FCRA. The FCRA imposes a duty upon Chilton to delete information that it cannot verify or is found to be inaccurate. Neither standard was satisfied by Pinner. It is undisputed that Chilton verified with Sherwin-Williams the credit information about Pinner on several occasions; on each occasion, Sherwin-Williams reported to Chilton that the status of Pinner's account was delinquent, and, in turn, Chilton notified Pinner of how

Sherwin-Williams classified his account. The Fifth Circuit found the evidence convincing that the credit report issued by Sherwin-Williams was truthful. In view of Chilton's verification procedures and the admitted accuracy of the data, the lower court's assessment of liability under §1681 of the FCRA is simply wrong. The panel's decision below not only conflicts with the case law of the other circuits, but conflicts with the case law of the Fifth Circuit.

STATEMENT OF THE CASE

Pinner filed a lawsuit alleging that Sherwin-Williams and its local manager, Schmidt, defamed him by maliciously placing and refusing to remove unauthorized customer charges on Pinner's Sherwin-Williams account. Pinner alleged that Chilton failed to comply with the FCRA because it reported the credit information that Sherwin-Williams voluntarily provided to Chilton.[2]

Although Pinner sustained no damages, the jury awarded him $200,000.00, which consisted of $100,000.00 in compensatory damages assessed *in solido* against Chilton, Schmidt and Sherwin-Williams, and $100,000.00 in punitive damages assessed solely against Chilton.

The Court of Appeals reversed the Judgment rendered against Schmidt and Sherwin-Williams because the court found that the credit information on Pinner was accurate. 805 F.2d at 1264-65. Concluding that the jury's award against Chilton lacked any evidentiary support of willful noncompliance with the FCRA, the Court of

---

[2] Federal question jurisdiction, 28 U.S.C. §1441(b), was based on the Fair Credit Reporting Act and the Fair Credit Billing Act; the district court exercised pendent jurisdiction over Pinner's state law claim of defamation.

Appeals vacated the punitive damage award against Chilton. However, while finding that liability could not be imposed upon Sherwin-Williams and Schmidt because the credit information was accurate, the Court of Appeals incongruously held Chilton liable for failure to verify the accuracy of the same accurate credit information.

The Fifth Circuit's dual findings of accurate credit information and noncompliance with §1681 of the Fair Credit Reporting Act simply cannot be reconciled. Equally as important is the lower court's ill-founded belief that Chilton cannot rely upon the credit information supplied by Sherwin-Williams; contravening both statutory and jurisprudential authorities, and failing to heed the opinion of the Federal Trade Commission staff that administers the FCRA, the circuit court held that Chilton must conduct an independent investigation to prove the accuracy of any disputed credit data – even when that credit data is admittedly correct! From this erroneous and unprecedented ruling, Chilton seeks review by this Court.

STATEMENT OF FACTS

Chilton is a credit reporting agency which exists to facilitate consumer credit. Chilton serves as a conduit to provide credit information to those businesses that contractually have requested access to this credit data. A subscribing company provides Chilton with credit information, including the payment history of the company's debtors. Chilton then makes this credit data accessible to the other subscribing companies so that credit decisions can be made quickly and inexpensively for consumers.[3] Each contract signed between Chilton and the subscribing company, such as Sherwin-Williams, stipulates that the subscribing company vouchsafes for the veracity of the credit data transmitted to Chilton.

---

[3] A credit report is issued at a cost of less than $2.00 to the subscriber.

Although Chilton verifies the accuracy of the data it receives, if Chilton and other credit reporting agencies must conduct independent investigations of information received from creditors, the entire credit process will be thwarted.[4] Chilton does not analyze consumer accounts nor does it participate in the decision as to whether credit will be extended or denied to a particular consumer; such functions are within the sole discretion of the "credit-grantor", that is, the subscribing member. Simply stated, the creditor, such as Sherwin-Williams, is the only one who can classify the consumer's credit history. The Fifth Circuit shifted the responsibility of evaluating credit accounts from creditors to credit reporting agencies. This decision undermines the FCRA.

Pinner was employed by Sherwin-Williams and maintained a charge account there. Pinner's immediate supervisor was James Schmidt. The trial testimony revealed that Pinner used his personal charge account to purchase merchandise for himself and also used his personal account to purchase merchandise for friends and various Sherwin-Williams customers who could not obtain a charge account with Sherwin-Williams. As the result of Pinner's refusal to pay for certain goods he had charged to his account, Sherwin-Williams classified Pinner's account as delinquent. Pinner acknowledged during his trial testimony that he was delinquent in paying for Sherwin-Williams merchandise, though he differed with Sherwin-Williams as to how much he owed. However, the amount of the delinquency, as

---

[4] Chilton maintains credit data on more than 111 million consumers throughout the United States. Most of these 111 million consumers have three or more reported credit transactions. Pinner had thirteen. Chilton's subscribing members revise the status of their credit accounts each month. Thus, if the circuit court's extra-statutory requirement is not corrected, the sheer volume of transactional data will perforce limit the current availability of consumer credit nationwide.

noted by the Fifth Circuit, is unimportant. 805 F.2d at 1264.[5]

On November 23, 1981, Pinner visited Chilton's offices to request a copy of his credit history. On the same day, Chilton furnished Pinner with a copy of his credit report, together with explanatory materials that set forth the procedures by which a consumer can question the contents of a credit report. Thereafter, Pinner called Chilton and confirmed his understanding that these documents established the procedures to follow should he desire to question any information in his credit report. These procedures include asking Chilton to contact the listed creditor to confirm the contents of the credit report or allowing the consumer to file a written dispute with respect to any information questioned in the credit report. Despite the profusion of information provided by Chilton, coupled with Pinner's admitted familiarity with credit reporting practices,[6] Pinner chose not to follow the appropriate dispute procedures nor question the accuracy of the November 23, 1981 credit report; rather, on January 11, 1982, Pinner's attorney, who is also Pinner's father, sent an argumentative letter to Chilton requesting that Chilton reexamine the status of Pinner's Sherwin-Williams account.

---

[5] The Court of Appeals repeatedly stated that Pinner was delinquent in paying his Sherwin-Williams account. This is a critically important point. The Fifth Circuit reversed the trial court and rendered judgment in favor of Sherwin-Williams because the information about Pinner's account was accurate. Yet the court inconsistently held Chilton liable on the basis that Chilton did not perform an independent investigation of this credit data. Any investigation had to lead to the same resultant: the credit information was correct. This double standard for liability can only be eliminated by this Court.

[6] Both Pinner and others testified that Pinner, as an assistant credit manager for Sherwin-Williams, had extensive training in credit procedures, and, in fact, Pinner's employment duties included regular contact with Chilton concerning credit histories of consumers and inquiries about specific credit data.

Chilton promptly contacted Sherwin-Williams in response to the letter from Pinner's father. Chilton related to Sherwin-Williams what Pinner's father contended. Sherwin-Williams again verified to Chilton the delinquent status of Pinner's account.[7] Sherwin-Williams maintained prior to trial, throughout the time of trial, and after the trial, that Pinner's account was delinquent. The Court of Appeals confirmed the delinquent nature of Pinner's account. Pinner did not dispute the delinquent status of his account, but only disputed the amount of his delinquency. Chilton's consumer credit report on Pinner accurately reflected that Pinner had a delinquent account at Sherwin-Williams, although a dispute remained as to the exact amount of the delinquency.

Pinner's claims against Schmidt and Sherwin-Williams were predicated on defamation and tortious conduct under article 2315 of the Lousiana Civil Code. Pinner asserted that Chilton violated the Fair Credit Reporting Act. Yet, the evidence at trial directly refutes Pinner's assertions and the Fifth Court noted this lack of evidence. Each Sherwin-Williams representative testified that Sherwin-Williams considered Pinner's account to be delinquent in 1982, 1983, 1984, and even at the time of trial in 1985.

As the trial testimony disclosed, Chilton contacted Schmidt, who, on behalf of Sherwin-Williams, corroborated Sherwin-Williams' initial report to Chilton and verified that Pinner's account was indeed delinquent. There can be no question that Chilton acted reasonably and in accordance with the FCRA when it contacted Schmidt, the highest officer and manager of the Sherwin-Williams store,

---

[7] Chilton contacted James Schmidt, who was the manager of the Sherwin-Williams store at which Pinner maintained his disputed account. Schmidt was the only individual knowledgeable about Pinner's Sherwin-Williams account. Schmidt testified that he verified Sherwin-Williams' classificataion of Pinner's account as delinquent.

to confirm the disputed amount. The individual most knowledeable about Pinner's account was Schmidt. Chilton had no other available source of authority to turn to in order to verify the status of Pinner's account with Sherwin-Williams.[8]

The management of Sherwin-Williams testified at trial that Pinner is still indebted to Sherwin-Williams, and that, to this day, Sherwin-Williams considers Pinner to be delinquent in paying his account. During his trial testimony Pinner acknowledged his delinquent debt to Sherwin-Williams. Because the status of Pinner's account was repeatedly confirmed as accurate by Sherwin-Wiliams and because Chilton's conduct was reasonable, Chilton's credit report could not amount to a violation of the FCRA. The lower court's ruling recognizing the accuracy of the credit report but nonetheless holding Chilton liable for reporting accurate information is contrary to the Fair Credit Reporting Act and existing juridical authorities. The Fifth Circuit's ruling sets an economically dangerous precedent.

The Fifth Circuit reversed the judgment against Schmidt and Sherwin-Wiliams on the basis that the credit information on Pinner was accurate. While finding that the credit data on Pinner was correct and accurate, the Fifth Circuit incongruously affirmed the compensatory damage award against Chilton for reporting the same information.[9] In an unprecedented and unsupportable ruling, the circuit court concluded that Chilton should not have contacted Schmidt in its reinvestigation, and that if

---

[8] It was not until the late stages of pre-trial discovery in this case, more than two years after the transaction questioned by Pinner, that the enmity between Pinner and Schmidt was made known to Chilton.

[9] The Court of Appeals held Chilton liable but found $25,000.00 to be the maximum possible award for a denial of credit and ordered a conditional remittitur. This remittitur is still inadequate given the absence of any proof of damages and Pinner's admission that he did not sustain any damages as the result of being denied credit on other occasions.

there were no other means of verifying Pinner's account. Chilton should have unilaterally deleted this credit information.[10] The Fifth Circuit felt that Chilton's verification procedures (which confirmed the accuracy of the original credit report) evidenced negligent non-compliance with the FCRA's reinvestigation procedures under Section 168li. In short, the circuit court held Chilton accountable for reporting accurate credit data. This ruling is contrary to basic common sense, and more importantly, if this holding is not corrected, the Fair Credit Reporting Act will be improperly expanded by judicial fiat.

To promote the reporting of accurate credit information, the FCRA contains procedures governing verification of disputed credit entries. 15 U.S.C. §1681i. The FCRA specifically provides that a credit reporting agency must reinvestigate disputed credit information and delete such information if it is found to be inaccurate or can no longer be verified. *Ibid.* Conversely, if reinvestigation of disputed credit information indicates that such disputed informa-

---

[10] Pinner filed this lawsuit in May, 1983, 1-1/2 years after he questioned the credit report containing the Sherwin-Williams account. Upon receipt of the lawsuit, Chilton placed the notation "Dispute - 5/83 - Litigation Pending" on Pinner's credit report. (See Appendix D for a copy of Pinner's credit report). This reference immediately alerted users of the credit report that a dispute had been lodged by Pinner, that the status of his account was subject to litigation he instituted, and that further inquiry should be made. In fact, such abbreviated signals to creditor grantors have been used and understood by Chilton's users for over six decades. The Fifth Circuit, failing to address the industry standards and relying upon only a portion of the reference read out of context, opined that Chilton did not follow reasonable procedures by use of the notation "Dispute - 5/83 - Litigation Pending." Yet the record is barren of any evidence suggesting, much less proving, that Chilton's notation was ambiguous. Indeed, Pinner did not even offer evidence on this issue. Without any evidence, the circuit court erroneously invalidated a national credit reporting system that has been effectively used since its inception at the beginning of the century. This unjustified dismemberment of the credit reporting industry should not be sanctioned by this Court. Review and reversal of the Fifth Circuit's ruling against Chilton is essential to permit a meaningful flow of credit data.

tion is either accurate or verifiable, then such information must be retained, and the consumer has the right to have his dispute added to the credit report. *Ibid.*

Chilton requests this Court to address two key issues which must be resolved concerning the FCRA. First, whether the accuracy of a credit report precludes the need to examine the reasonableness of a credit reporting agency's procedures, and, second, what constitutes verification of credit data under the FCRA. The lower court's ruling is contrary to the language of the FCRA and conflicts with the previously reported case law on these two issues. The federal judiciary has repeatedly held that liability does not attach under the FCRA if the challenged credit report is accurate. *See, e.g., Equifax, Inc. v. Federal Trade Commission,* 678 F.2d 1047, 1051 (11th Cir. 1982) and cases cited therein. "It is axiomatic that no claim can be stated under the (FCRA] unless the plaintiff demonstrates that the report which he challenges was inaccurate." *Wright v. TRW,* 588 F.Supp. 112, 114 (S.D. Fla. 1984).

In this case, the Fifth Circuit found that the credit report was truthful and accurate. Under the controlling statutory and jurisprudential principles, the accuracy of the credit data in Pinner's credit report should have foreclosed judicial inquiry into the reasonableness of Chilton's procedures. *See, e.g., Todd v. Associated Credit Bureau,* 447 (E.D. Pa. 1977), *aff'd mem.,* 578 F.2d 1376 (3d Cir. 1978), *cert. denied,* 439 U.S. 1068 (1979) ["*Todd*"]. The Fifth Circuit inexplicably failed to heed the rulings of other circuit courts, failed to follow its own ruling on this issue, and refused to follow this Court's ruling in *Todd. See also Peller v. Retail Credit Co.,* C.A. 17900, Dec. 6, 1973 (N.D. Ga.), *aff'd mem.,* 505 F.2d 733 (5th Cir. 1974) ["*Peller*"]. Notwithstanding the fact that Pinner's credit report was accurate, the Fifth Circuit launched a judicial inquiry into the reasonableness of Chilton's verification process. *Con-*

tra, Todd, Peller, supra. The Fifth Circuit thus erred when it evaluated the reasonableness of Chilton's procedures after its finding of accuracy. The court further breached the Act by concluding that Chilton should be liable for the manner in which it verified the Sherwin-Williams account. The Fifth Circuit's finding of liability against Chilton is both unprecedented and contrary to the body of case law in this area. *See e.g. Equifax, Inc. v Federal Trade Commission; Todd v. Associated Credit Bureau, supra.* The Fifth Circuit's finding of accurate credit information is irreconcilable with its finding of liability under the FCRA. The Fifth Circuit's incongruous and legally wrong ruling must be corrected.

The second major issue that must be resolved concerns the verification procedures under the FCRA. Specifically, the essential question is: what constitutes verification under the FCRA? There is no statutory definition of "verification" in the FCRA. Rather, the Act merely provides that a credit reporting agency must reinvestigate disputed credit information and delete such information if it is found to be inacccurate or can no longer be verified. 15 U.S.C. §1681i(a). The Federal Trade Commission, which is responsible for enforcement of the Fair Credit Reporting Act, recommends that verification of credit data be accomplished in the precise manner that Chilton followed. The FTC's staff opinion (Appendix E) cogently states that consumer reporting agencies are entitled to rely upon the creditor's verification. The FTC recognizes that creditors undergo extensive investigations to ensure the reliability of the credit information furnished by them. The FTC's staff opinion on the propriety of oral verification is of particular import, as this Court has consistently given great deference to an administrative agency's interpretation of a statute Congress has entrusted an agency to administer. *EPA v. National Crushed Stone Assoc.*, 449 U.S. 64, 83 (1980). Such deference is justified because of the agency's

expertise in implementation and enforcement of the statute they are charged with administering. *American Cyanamid Co. v. U.S. E.P.A.*, 810 F.2d 493 (5th Cir. 1987). As stated by this Court in *EPA v. National Crushed Stone Assoc.*, *supra*, "[i]t is by now commonplace that 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' " 449 U.S. at 83.

In this case, Chilton repeatedly contacted Schmidt, the store manager at Sherwin-Williams, and verified the status of Pinner's account. Schmidt was the only individual knowledgeable about Pinner's delinquent account. On each occasion, Schmidt verified the delinquency of Pinner's account with Sherwin-Williams. The Fifth Circuit concluded that this credit information was truthful, but it held that Chilton violated the FCRA by contacting only Schmidt to verify the disputed, albeit correct, credit information. Such reasoning is fallacious.

The Fifth Circuit's finding of liability was erroneously predicated upon the Sixth Circuit's decision in *Bryant v. TRW, Inc.*, 689 F.2d 72 (6th Cir. 1982). In *Bryant*, the Sixth Circuit held that where a credit reporting agency had contemporaneous knowledge of a dispute between the consumer and his creditors, merely making two telephone calls to the creditors was insufficient to reverify *inaccurate* information in its credit report. *Bryant* is simply inapposite in this case because in *Bryant* the credit information was inaccurate and the consumer reporting agency had contemporaneous knowledge of the enmity between the consumer and the creditor. In the instant case, the Fifth Circuit found the contents of the credit report were accurate and Chilton did not know of any enmity between Pinner and Schmidt at the time Chilton verified the status of the Sherwin-Williams account. The Court of Appeals' reliance on *Bryant* is therefore misplaced.

In its opinion, the Fifth Circuit stated that if "there was no other authority to turn to to verify Pinner's account, Chilton should have deleted the information. . . ." 805 F.2d at 1262. The result of the Fifth Circuit's directive is the deletion of accurate credit information. However, Chilton cannot unilaterally excise accurate credit information under the FCRA. Indeed, the deletion of accurate information would impair the ability of banks and other credit grantors to make intelligent credit decisions. Such a procedure directly contravenes the purpose of the FCRA as stated by Congress. (For a thorough discussion of the legislative purpose behind enactment of the FCRA, see House of Representatives Report No. 91-1587 (Conference Report to accompany H.R. 15073), 91st Cong., 2d Sess., 116 Cong. Rec. S 17,634-17,637 (1970)). The FCRA requires the deletion of information only if the information is found to be inaccurate or if it can no longer be verified. 15 U.S.C. §1681i. In this case, reinvestigation led to the verification of accurate information. Under the FCRA, it was incumbent upon Chilton to retain the accurate credit information in Pinner's consumer credit report, not to delete it as the Fifth Circuit erroneously mandated.

A review of the FCRA reveals that there is no requirement imposed on consumer reporting agencies either to delete accurate information or to conduct independent investigations of credit data supplied by creditors. Section 1681i of the FCRA requires deletion only of information which is found to be inaccurate or information which can no longer be verified. More importantly, the FCRA specifically provides that if verification does not resolve the consumer's dispute, the consumer is entitled to file a brief statement setting forth the nature of the dispute. 15 U.S.C. §1681i(b). Contrary to the Fifth Circuit's decision, the FCRA does not prohibit oral verification of accurate information received from a creditor who is involved in a dispute with a consumer. Indeed, the statutory language in §1681i

providing for consumer statements setting forth the nature of the unresolved dispute impliedly recognizes that some disputes over credit information may never be resolved. The FTC opinion (Appendix E), following the strict letter of the Act, substantiates that Chilton's procedures comport with the FCRA.

The Fifth Circuit's ruling imposes an extra-statutory addendum to the verification procedures established by Congress under the FCRA. The Fifth Circuit's novel interpretation of verifying accurate information under the FCRA counters the straightforward language of the Act and will create chaos within the credit reporting industry. More importantly, the erroneous decision by the Fifth Circuit has a disparately adverse effect upon jurisprudential interpretation of the FCRA because of the paucity of case law in this area and thus warrants review by this Court.

REASONS FOR GRANTING THE PETITION

If the Fifth Circuit's decision is allowed to stand, a situation antithetical to the basic purpose of the FCRA is created, namely, consumer reporting agencies will not be able to disseminate accurate and complete credit reports. The Fifth Circuit's decision will encourage fruitless judicial inquiries into the reasonableness of consumer reporting agencies' procedures when it is undisputed that accurate credit information is being reported. Clearly, judicial scrutiny of the reasonableness of an agency's procedures should be limited to instances where the challenged credit report is not accurate. Additionally, the Fifth Circuit's interpretation of verification procedures under the FCRA is flatly incorrect. The FCRA is devoid of any statutory prohibition against contacting a creditor to verify disputed credit information. Indeed, in most situations, such as the instant case, there simply is no other source to contact. If consumer reporting agencies must follow the Fifth Circuit's opinion that such verified information must be

deleted, the perverted outcome will be the deletion of accurate credit information. The Fifth Circuit's novel construction of the Act is completely at odds with the purpose of this statute, which is to assure dissemination of accurate and thorough credit information.

It is important to the credit reporting industry for this Court to grant certiorari in order to resolve the conflict among the circuits (and within the Fifth Circuit) as to when judicial inquiry should begin under the FCRA and in order to articulate the means of verifying credit information under the FCRA. More specifically, this Court should grant the present application for review because:

(1) The Court Below Erroneously Found Liability Under the Fair Credit Reporting Act Notwithstanding the Fact that the Challenged Credit Report was Found to be Accurate.

As a matter of law, the evidence presented at trial, including Pinner's own admissions, as well as the Fifth Circuit's findings on appeal, do not allow a finding of liability under the FCRA on the part of Chilton. The pivotal question in this lawsuit is whether Pinner's credit history was accurately maintained and reported. It was. As stated by the Fifth Circuit, the credit information reported by Sherwin-Williams on Pinner was accurate. Because the credit report was true, the Fifth Circuit's assessment of liability against Chilton goes beyond the FCRA and clashes with the rulings by other circuits and this Court. *See, Todd v. Associated Credit Bureau Services, Inc., supra.*

When a credit reporting agency's report contains accurate information, this Court and the lower courts have routinely been unwilling to permit actions under the FCRA. *See, e.g., Todd,* (3d Cir), *cert. denied, supra; Wright v. TRW, supra; Peller v. Retail Credit Co.,* (5th Cir.), *supra; Roseman v. Retail Credit Company,* 428 F.Supp. 643 (E.D.

Pa. 1977); *Middlebrooks v. Retail Credit Co.*, 416 F.Supp. 1013, 1015 (N.D. Ga. 1976). Until the aberrant ruling by the court below, the jurisprudence uniformly provided that if the contents of a consumer report are true, and Pinner's credit report unquestionably was, then judicial assessment of the agency's procedures is not appropriate. *Id.*

In its decision, the Fifth Circuit repeatedly recognized the accuracy of Chilton's credit report:

(1) ". . . Chilton had reaffirmed the accuracy of his [Pinner's] credit history." 805 F.2d at 1263.

(2) "Schmidt simply confirmed the accuracy of that information when contacted by Chilton employees." 805 F.2d at 1265.

(3) "The record clearly shows that Pinner had a delinquent account with Sherwin-Williams. . . . " 805 F.2d at 1264.

Stating that any potential creditor checking with Chilton would only be concerned with whether the account was delinquent, the Fifth Circuit then concluded that the evidence overwhelmingly revealed the delinquent nature of Pinner's account. Consequently, analysis of Pinner's claim should have gone no further under the FCRA.[11] Under the governing case law, the accuracy of Chilton's credit report should have foreclosed judicial consideration of the reasonableness of Chilton's credit reporting procedures. *See, Todd, Wright, supra; Lowry v. Credit Bureau, Inc. of Georgia*, 444 F.Supp. 541, 544 (N.D. Ga. 1978). In *McPhee*

---

[11] After the institution of this lawsuit, Sherwin-Williams discovered an accounting error regarding the amount of Pinner's delinquency; the Fifth Circuit, however, found that Sherwin-Williams' mistake as to the amount owed by Pinner to Sherwin-Williams did not render the credit report inaccurate. In fact, there was no evidence presented at trial that had the correct delinquency been reported (*i.e.*, $121 instead of $171), Pinner would have been granted credit. Hence, the Fifth Circuit concluded that Chilton's credit report was correct.

v. Chilton Corporation, 468 F.Supp. 494, 497 (D.Conn. 1978), the district court cogently summarized the applicable axiom:

> No judicial inquiry into an agency's procedures for gathering and evaluating information is required . . . if the report in question is in fact true. . . . In other words, accuracy of the final product forecloses inquiry into the reasonableness of the procedures used to produce the report . . . .

Because the Fifth Circuit found Chilton's credit report to be truthful, the Fifth Circuit should have gone no further. By assessing liability against Chilton, the Fifth Circuit has developed a new and erroneous interpretation of the FCRA. This erroneous decision must be rectified by this Court.

(2) A Conflict Exists Among Circuit Courts as to the Accuracy Defense Under the Fair Credit Reporting Act.

Since the enactment of the FCRA seventeen years ago, no court, except the Fifth Circuit's decision in the instant case, has assessed liability for reporting truthful and accurate informatoin. *See, Todd v. Associated Credit Bureau, supra; Wright v. TRW, supra, following, Peller v. Retail Credit Co.*, (5th Cir.), *supra*,. Indeed, every circuit and district court that has considered possible liability under the FCRA has held that proof of the inaccuracy is the first requisite to proving a violation. *See, Bryant v. TRW, Inc., supra; McPhee v. Chilton Corporation, supra; Todd v. Associated Credit Bureau Services, supra; Peller v. Retail Credit Co, supra; Lowry v. Credit Bureau, Inc., supra; Roseman v. Retail Credit Co., supra; Pendleton v. Trans Union Systems Corp.*, 76 F.R.D. 192 (E.D. Pa. 1977); *Middlebrooks v. Retail Credit Co., supra; Austin v. Bank America Service Corp.*, 419 F.Supp. 730 (N.D. Ga. 1974).

In *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37

(D.C. Cir. 1984), the circuit court held that a consumer can bring suit for a violation of §1681e(b) of the FCRA *only* if a credit reporting agency issues an inaccurate report on the consumer, for only then does harm flow from the agency's violation. *Ibid.* In a companion case, *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (D.C. Cir. 1984), the D. C. Circuit reiterated its holding in *Koropoulos*, stating that

> [T]his court, in a companion case decided today, holds that once a credit report is shown to be "inaccurate" section 1681e(b) commands an inquiry as to whether the procedures followed by the reporting agency in preparing the report were reasonable.

734 F. 2d at 49.

The D.C. Circuit's position that a credit report must be shown to be inaccurate before judicial inquiry can begin under the FCRA is the same as the positions adopted by the Third, Sixth and Eleventh Circuits.

In *Bryant v. TRW, Inc.*, 487 F.Supp. 1234, *aff'd* 689 F.2d 72 (6th Cir. 1982), the jury was instructed that if the challenged credit reports were accurate, their verdict must be for the defendant. Inaccuracy is a condition precedent to pursuing an action under the FCRA. In assessing liability, the Sixth Circuit in *Bryant* stated that the testimony indicated that many of the credit entries had been shown to be inaccurate.[12]

In accord with the D.C. and Sixth Circuit's recognition of the accuracy defense is the summary affirmance by the Third Circuit and this Court in *Todd v. Associated*

---

[12]*Courts in the Sixth Circuit following Bryant* similarly have ruled that in order to recover under the FCRA, plaintiffs must prove the credit reporting agency reported inaccurate information. *Morris v. Credit Bureau of Cincinnati, Inc.*, 563 F.Supp. 962, 967 (S.D. Ohio 1983).

Credit Bureau, supra. In *Todd,* the court ruled that it did not need to reach the issue of reasonableness if it found that the credit report was accurate. Upon finding that the consumer reporting agency reported accurate information, the court concluded that relief under the FCRA was unavailing. Similarly, in *Equifax, Inc. v. FTC,* 678 F.2d 1047, 1051 (11th Cir. 1982), the circuit court did not challenge the consumer reporting agency's position that "every court that has considered a section 607(b) violation [15 U.S.C. §1681e(b) has held that proof of inaccuracy is the first requisite to proving a voilation."[13]

Chilton's report was accurate. Under the case law in the Third, Sixth, Eleventh and D. C. Circuits and under the case law in the Fifth Circuit excluding the decision below, no judicial inquiry into the reasonableness of Chilton's procedures would be made, for the very purpose of the FCRA has been met: namely, the dissemination of accurate consumer credit information. The Fifth Circuit's decision in the instant case, finding liability in the context of accurate information, not only conflicts with the jurisprudence of courts in other circuits, but is at odds with the Fifth Circuit's prior holding in *Peller v. Retail Credit Co., supra.* In *Peller,* the court found that the credit information was true and therefore granted summary judgment in favor of Retail Credit Company, stating that in order to pursue a cause of action based on a violation of the FCRA, the report sought to be attacked must be inaccurate. *Peller,* an unpublished decision, was affirmed without opinion by the Fifth Circuit on appeal. *See,* 505 F.2d 733 (1974); see also, *Austin v. Bank America Service Corp., supra,* 419 F.Supp. at 732-33, for a concise summary of the *Peller* decision.

---

[13] Courts in the Eleventh Circuit following *Equifax* have stated that "it is axiomatic that no claim can be stated under [the FCRA] unless the plaintiff demonstrates that the report which he challenges was inaccurate." *Wright v. TRW, supra,* 588 F.Supp. at 114.

In sum, the Fifth Circuit's conclusion that the contents of Pinner's credit report is accurate is incompatible with the finding of liability against Chilton under the FCRA. The jurisprudence dictates that liability under the FCRA attaches if and only if the credit report is inaccurate. Based upon the accuracy of Chilton's credit report, Pinner's claim against Chilton lacks any factual or legal support. The Fifth Circuit's decision is unprecedented, for it not only conflicts with the existing case law of the Fifth Circuit, but it also conflicts with all the other circuit courts that have considered the FCRA and held that proof of inaccuracy is a requisite element in proving a violation under the FCRA. *See, Equifax, Inc. v. FTC, supra,* 678 F.2d at 1051 and cases cited therein. *See* also, *Koropoulas v. Credit Bureau, Inc., supra; Bryant v. TRW, supra;* and *Todd v. Associated Credit Bureau, supra.*

(3) This Case Raises Important And Unresolved Questions as to What Constitutes Verification Under the FCRA.

Notwithstanding the fact that the credit report was found to be accurate, the Fifth Circuit concluded that it was unreasonable for Chilton to contact only Schmidt, the Sherwin-Williams manager, in Chilton's reinvestigation that led to the verification of the accuracy of Pinner's credit data. In its opinion, the Fifth Circuit erroneously reasoned that "because of Schmidt's involvement, contacting only him was insufficient to 'reverify' the delinquent account." 805 F.2d at 1262. This statement presupposes that there was some reason for Chilton to doubt the credibility of Schmidt. But this supposition lacks factual support. It is undisputed that *at the time the reverification took place,* no facts had come to the attention of Chilton which would discredit Schmidt. Chilton did not learn of the aversion between Schmidt and Pinner until the pre-trial phase of this case -- more than two years after the verification of Pinner's account. The reasonableness of Chilton's

conduct must be assessed in light of its knowledge at the time reverfication occured. The Fifth Circuit, however, judged Chilton's reverification procedures in 1982, based upon salient facts that were not made known until 1984. If Chilton had known of Schmidt's personality clash with Pinner at the time the credit data was verified, Chilton agrees that contacting only Schmidt would be unreasonable under the FCRA. However, there is no evidence indicating that at the time of reverification Chilton possessed knowledge, either actual or constructive, impugning Schmidt's credibility.

Under §1681i of the Act, there are myriad provisions governing the procedures to be followed in the case of disputed credit information. First, the FCRA provides that if the accuracy of any item of information contained in a consumer credit report is disputed by a consumer, the consumer reporting agency must reinvestigate and record the current status of that information. 15 U.S.C. §1681i(a). If the information is found to be inaccurate or can no longer be verified, the consumer reporting agency must delete that information. Although the FCRA does not define what is required for verification of credit data, the Federal Trade Commission has clarified the verification process.[14] According to the FTC's interpretation, although a consumer reporting agency must reinvestigate a disputed item contained within a credit report and delete any item that cannot be verified, verification under the Fair Credit Reporting Act does not require that documentation, such as sales receipts, be produced by the creditor to the consumer reporting agency. According to the FTC, it is reasonable to permit a credit bureau to rely upon the creditor's financial records when it attempts to verify disputed information with the creditor. *See,* FTC staff opinion attached as Appendix E. Implicit in the FTC's opinion is the recognition

---

[14] Pursuant to the FCRA, compliance with the FCRA is enforced by the FTC. 15 U.S.C. §1681s.

that verification under the FCRA must be between the consumer reporting agency and the creditor, and more importantly, the FTC anticipates that verification of credit data customarily will be accomplished by verbal confirmation.

In its decision, the Fifth Circuit based its finding of liability on the fact that Chilton should have contacted others besides Schmidt, the Sherwin-Williams manager, in its reinvestigation of Pinner's credit data. The Fifth Circuit concluded that it was not reasonable for Chilton to contact Schmidt to verify Pinner's account. Aside from the fact that Schmidt was the only person with direct knowledge about Pinner's account, all of the Sherwin-Williams personnel confirmed Schmidt's response, viz, that Pinner's account was delinquent. In its opinion on verification procedures, the Fifth Circuit overextended the Sixth Circuit's ruling in *Bryant v. TRW, Inc., supra.* In *Bryant,* the consumer had met several times with the consumer reporting agency *prior to* issuance of the credit report and the Sixth Circuit found that the credit report was both inaccurate and that the credit agency knew that the credit data was inaccurate. The element of inaccuracy, compounded by knowledge of the inaccuracy, were the determinative bases of the Sixth Circuit's rationale in *Bryant.* In contradistinction, Chilton's report on Pinner was accurate and Chilton had no contemporaneous knowledge of any aversion between Pinner and Schmidt. The reasonableness of Chilton's conduct must be assessed in light of its knowledge at the time of verification, not upon 20/20 hindsight. The Fifth Circuit erred by evaluating Chilton's conduct in 1982 against facts that were not made known until 1984.

The Fifth Circuit's approach assessing liability against Chilton because it contacted the creditor's manager to verify credit data improperly expands the Fair Credit Reporting Act. Such judicial activism is not only unwarranted, but flies in the face of regulatory intent and prior case law. Indeed, there usually is no one else to con-

tact besides the creditor to verify credit data. Ironically, if consumer reporting agencies follow the Fifth Circuit's ill-founded directive that such verified information must be deleted, the outcome will be the deletion of accurate credit information. Such a result completely eviserates the avowed purpose of the FCRA, which is to assure dissemination of accurate and complete credit information.

(4) The Decision Below has Far-Reaching Ramifications on the Credit Reporting Industry and has the Effect of Rewriting the Fair Credit Reporting Act.

Under the Fifth Circuit's decision, once Pinner lodged his dispute with Sherwin-Williams, Chilton could no longer contact Sherwin-Williams in an effort to verify the disputed credit information. More importantly, the Fifth Circuit's ruling suggests that if there is no entity to contact other than the creditor, the disputed credit information must be deleted altogether. The Fifth Circuit's holding below contravenes *sans* authority §1681i of the Fair Credit Reporting Act and thus encourages procedures that violate the Act.

Under §1681i, credit information can be deleted if and only if reinvestigation reveals that such information is inaccurate or can no longer be verified. Chilton cannot unilaterally delete correct credit information. If Chilton had deleted Pinner's Sherwin-Willaims account, which was accurate credit information, Chilton would have violated Section 1681i(a). If allowed to stand, the Fifth Circuit's holding that requires deletion of credit information which is accurate and has been verified by the creditor will set the consumer credit industry on its head.

With approximately 200 million consumers, credit grantors utilize more than 850,000 consumer reports each day to facilitate the extension of credit. Chilton cannot launch an independant investigation for every dispute without making the cost of credit prohibitive, and, often making consumer credit unavailable. Practically speaking,

the status of credit accounts is known only by the creditor and the consumer. The procedure urged by the Fifth Circuit would stifle the free-flow of credit information which the FCRA seeks to safeguard.[15] The Fifth Circuit's ruling sounds the death knell for the quick and inexpensive granting of consumer credit. Because the lower court's ruling violates the FCRA and would seriously undermine the consumer credit system in this country, this Court should review the error-laden decision below. Credit reports provide vital credit information to credit grantors. Credit grantors rely on the information furnished by credit reporting agencies to make informed business decisions and credit evaluations. Such reasoned evaluations and decisions will be eliminated if consumer reporting agencies are forced to delete truthful credit information.

Aside from the incongruity of determining that Pinner's Sherwin-Williams account is accurate, but that Chilton nonetheless should have contacted another independent source to confirm the accuracy of this information, the Fifth Circuit's opinion has the effect of rewriting Section 1681i(a). If Sherwin-Williams' verification of one of its accounts is insufficient, then Congress - not the Fifth Circuit - should amend the Fair Credit Reporting Act.

CONCLUSION

The errors committed by the Fifth Circuit unduly impede consumer credit reporting and have the effect of rewriting the FCRA. The finding by the Fifth Circuit that the credit information presented by Chilton was correct should have foreclosed judicial consideration of the reasonableness of Chilton's procedures under the Fair Credit Reporting Act and more importantly, should have precluded any liability against Chilton under the Act. The

---

[15] Congress legislatively recognized that some consumer disputes will not be resolved. Thus, §1681i(b) allows the consumer to file a brief statement setting forth the nature of the dispute; this statement becomes part of the credit report. *Accord*, FTC Opinion (Appendix E).

accuracy of Pinner's credit information prevented Chilton from unilaterally eliminating data from Pinner's credit history under section 1681i. Moreover, since Chilton did not know of the enmity between Schmidt and Pinner at the time of verification, it was reasonable for Chilton to contact Schmidt, as the most senior Sherwin-Williams executive, to verify the delinquency of Pinner's account.

The Fifth Circuit, in conformity with other circuit courts, had heretofore held that liability under the FCRA can attach if, and only if, the credit report sought to be attached is inaccurate. Now, the Fifth Circuit has done an about-face in finding that liability under the Fair Credit Reporting Act can be based on an accurate credit report -- which conflicts with the other decisional law.

If the Fifth Circuit's unprecedented ruling is not rectified, national credit reporting agencies will be unable to furnish complete credit information and the very purpose behind the congressional enactment of the FCRA to ensure the maximum possible accuracy of credit reports will be thwarted. Such an anomaly should not be judicially sanctioned.

Consumer reporting agencies such as Chilton have assumed a vital role in making credit information readily available to facilitate the granting of consumer credit. The Fifth Circuit's decision, unless corrected, will alter the FCRA and will prevent the essential flow of credit information.

Chilton respectfully requests this Court to grant its petition for a writ of certiorari in order to clarify the statutory directives of the Fair Credit Reporting Act and to resolve the conflict among the circuit courts as to the accuracy defense under the Fair Credit Reporting Act. The unprecedented and unsubstantiated interpretation of the FCRA by the Fifth Circuit must be corrected and calls for

an exercise of this Court's power of supervision.

Respectfully submitted,

HARRY A. ROSENBERG
PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS
Thirtieth Floor, Texaco Center
400 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 566-1311

ATTORNEYS FOR PETITIONER,
CREDIT BUREAU SERVICE-NEW
ORLEANS, D/B/A CHILTON
CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that I have on this 8th day of May, 1987, served three copies of the foregoing Petition upon the following, by placing same in the United States mail, properly addressed and first class postage prepaid:

(1) Counsel for plaintiff,
Edward K. Pinner, Sr., Esq.
511 Audubon Building
New Orleans, Louisiana 70112

(2) Counsel for Sherwin-Williams Company and James J. Schmidt,
Ralph Alexis, III, Esq.
Porteous, Hainkel, Johnson & Sarpy
704 Carondelet Street
New Orleans, Louisiana 70130

HARRY A. ROSENBERG

APPENDIX A

Thomas K. PINNER, Plaintiff-Appellee Cross-Appellant,

v.

James J. SCHMIDT, the Sherwin-Williams Company and Credit Bureau Services-New Orleans, d/b/a Chilton Corporation, Etc., et al., Defendants-Appellants Cross-Appellees.

No. 85-3524

United States Court of Appeals,
Fifth Circuit.

Dec. 18, 1986.

Rehearing and Rehearing En Banc Denied Feb. 10, 1987.

Consumer brought action against account holder, store manager, and credit bureau service for damages to his creditworthiness and reputation, humiliation and mental distress, noncompliance with Fair Credit Billing Act, and negligent and willful violations of Fair Credit Reporting Act. The United States District Court for the Eastern District of Louisiana, 617 F.Supp. 342, Charles Schwartz, Jr., J., entered judgment on jury verdict for consumer. On appeal, the Court of Appeals, Edwin F. Hunter, Jr., District Judge, sitting by designation, held that: (1) jury could find that credit bureau service had negligently violated Fair Credit Reporting Act by contacting only store manager during reinvestigation of disputed debt and by failing to clarify that pending litigation over debt was instituted by consumer; (2) credit bureau service had not

willfully violated that act and could not be held liable for punitive damages, in view of testimony concerning attempts to contact consumer's attorney by telephone; (3) account holder could not have violated Fair Credit Billing Act as consumer had failed to provide timely notice of billing error, and account holder had not defamed consumer by communicating false information to credit bureau service; (4) manager's allegedly defamatory statements and actions were either time barred or were substantially true; and (5) compensatory damage award was excessive, and conditional remittitur would be ordered with maximum recovery limit of $25,000.

Affirmed in part, reversed and rendered in part, and reversed in part.

1. Credit Reporting Agencies 1

Credit reporting agency has duty of reasonable care in preparation of consumer report and duty to reinvestigate and delete information from that report which is found to be inaccurate or no longer verifiable once consumer has protested material's inclusion. Consumer Credit Protection Act §§ 607(b), 611(a), as amended, 15 U.S.C.A. §§ 1681e(b), 1681i(a).

2. Federal Civil Procedure 2331

In assessing motions for new trial or remittitur court is called upon to determine whether verdict is excessive or contrary to weight of evidence or has resulted in miscarriage of justice.

3. Credit Reporting Agencies 4

Jury could find that credit bureau service had negligently breached statutory duty to reinvestigate disputed information in consumer's file, based on evidence that service had contacted only manager of account holder's store after receiving notice of dispute over account from consumer's attorney, as service knew of manager's past disagreements with consumer. Consumer Credit Protection Act § 611(a), as amended, 15 U.S.C.A. § 1681i(a).

4. Credit Reporting Agencies 3

Credit bureau service breached its statutory duty to follow reasonable procedures to assure maximum possible accuracy of information in consumer report, where it noted that litigation was pending over reported debt without indicating that consumer had instigated that litigation; ambiguity as to who was being sued could have been simply prevented, particulary in light of service's knowledge of dispute. Consumer Credit Protection Act § 607(b), as amended. 15 U.S.C.A. § 1681e(b).

5. Credit Reporting Agencies 4

Credit bureau service had not willfully violated Fair Credit Reporting Act and could not be liable for punitive damages based on failure to follow reasonable procedures to assure maximum possible accuracy of consumer report and failure to adequately reinvestigate disputed entry on that report, where service had promptly furnished consumer with copy of credit report on request and had made no effort to conceal any information and service employee's unrefuted testimony established that they had twice

attempted to contact consumer's attorney by telephone to relay that accuracy of disputed information had been reaffirmed. Consumer Credit Protection Act § 616, as amended, 15 U.S.C.A. § 1681n.

6. Credit Reporting Agencies 1

Account holder was not liable for violation of Fair Credit Billing Act based on failure to reinvestigate and verify disputed billing, where consumer had not given written notice of specific dispute until more than 60 days after receipt of statement which allegedly contained billing error. Consumer Credit Protection Act §§ 161-171, as amended, 15 U.S.C.A. §§ 1666-1666j.

7. Libel and Slander 1

Under Louisiana law, party seeking to maintain action in defamation must prove defamatory words, publication, falsity, actual or implied malice, and resulting injury, and truth or substantial truth is defense to suit for defamation. LSA-C.C. art. 2315.

8. Libel and Slander 55

Account holder could not be liable to consumer for defamation based on communication of information regarding deliquent account that overstated debt by less than $50; potential creditor would only be concerned with fact of delinquency, not amount, and information presented was substantially correct. LSA-C.C. art. 2315.

9. Libel and Slander 55, 76

Manager of store owned by account holder could not

be liable for defamation to consumer based on alleged statements that consumer was using illegal drugs and was wanted by FBI and that consumer's life was in danger or on alleged placing of fictitious charges on consumer's account and confirmation that account was delinquent; claim was filed more than one year after statements were allegedly made and was therefore time barred, and information regarding account was substantially correct. LSA-C.C. arts. 2315, 3492.

10. Credit Reporting Agencies 4
Federal Courts 945

Award of $100,000 in compensatory damages arising from credit bureau service's negligent violations of Fair Credit Reporting Act was excessive and conditional remittitur with $25,000 as maximum possible recovery would be ordered, in absence of evidence that consumer suffered any out-of-pocket expenses and in view of realistic levels of consumer's humiliation and embarrassment. Consumer Credit Protection Act §§ 602-622, as amended, 15 U.S.C.A. §§ 1681-1681t.

Harry Rosenberg, Phelps, Dunbar, Marks, Claverie & Sims, Taryn S. Southon, New Orleans, La. for CBS.

Ralph R. Alexis, III, Porteous, Hankel, Johnson & Sarpy, New Orleans, La., for Schmidt and Sherwin-Williams.

Edward K. Pinner, Sr., New Orleans, La., for Pinner.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GEE and HILL, Circuit Judges, and HUNTER*, District Judge.

EDWIN F. HUNTER, Jr., District Judge:

We review a judgment entered after a jury returned a verdict in the amount of $200,000 for violations of the Fair Credit Reporting Act, 15 U.S.C.A §§ 1681-1681t (West Supp. 1986), damage to creditworthiness and reputation, and humiliation and mental distress. Defendants appeal from the denial of their motions for directed verdict, judgment notwithstanding the verdict, and a new trial or remittitur. Plaintiff appeals from the denial of his motion to amend the judgment to include an award of pre-judgment interest.

1.BACKGROUND

Plaintiff-Appellee, THOMAS K. PINNER, was formerly employed at a store owned by defendant-appellant SHERWIN-WILLIAMS. Defendant-appellant JAMES E. SCHMIDT managed the store. Pinner worked as an outside sales representative, selling Sherwin-Williams products to customers within his sales territory. During his tenure as an employee Pinner maintained a personal charge account with the company on which he could charge merchandise for himself or his family. Pinner would occasionally use this account to charge merchandise for his

---

* District Judge of the Western District of Louisiana, sitting by designation.

customers who had no account at the store of their own. Pinner nevertheless remained personally responsible for the account at all times.

As the district judge noted, "considerable tension developed between plaintiff and Schmidt, attributable to, inter alia, social and business rivalry." Plaintiff's brief describes plaintiff as a handsome young male and Schmidt as a middle aged, dominant male who sexually harrassed several young female employees. Plaintiff argues " a relationship began to bloom between Pinner and one of the young female employees, the one defendant Schmidt wanted the most, the one defendant Schmidt had wanted since she was nine years old, the one Schmidt was obsessed with."[1]

The tension between Pinner and Schmidt led to a dispute over Pinner's personal charge account. Pinner

---

[1] In their Motion in Limine, defendants anticipated the saturation of ad hominem sex revenge evidence which plaintiff might use to support his case. The trial judge denied the motion to exclude the evidence. It was permitted to show Schmidt's alleged motive—his hatred of Pinner. This evidence became a center piece of the trial as illustrated by this excerpt:

> "Defendant Schmidt fancied himself as a bull moose on a mountain with 30 cows being threatened by a younger bull."

Schmidt categorically denied the harassment charges. Moreover one of two complaining young ladies who testified as to a sexual advance by Schmidt related that her knowledge of sex at that time was limited to "ideas from reading books." This was later specifically refuted by two male witnesses who testified as to their activities with her contemporaneously with the period at issue. Counsel for plaintiff in an eloquent closing argument referred to these two rebuttal witnesses as the "kiss and tell" boys.

There are no empirical data or studies of psychological influence that can be brought to bear, at least with any clear focus on a specific case. But, our analysis of the entire record persuades us that the admission of this evidence may have triggered the damage awards.

believed that Schmidt had entered several fictitious charges on his account while Pinner was on vacation. As the working relationship soured in late 1980 Pinner left Sherwin-Williams with his personal charge account reflecting a $171.11 debit balance, a figure Pinner vigorously disputed. The evidence at trial tended to show that the correct balance was $121.71.

Sherwin-Williams is a subscriber of defendant-appellant C.B.M. of Louisiana, Inc. (Chilton), a credit reporting agency. Chilton receives various types of credit information from its subscribing companies, including the payment history of the companies' consumer debtors. Chilton then distributes its credit reports on consumers to other subscribing companies.

Sherwin-Williams executive Robert Stewart classified Pinner's account as delinquent in June,1980, and again in January, 1981. This information was relayed to Chilton at these times and was included in Pinner's credit file. Sherwin-Williams made no mention of Pinner's objections to the amounts allegedly due. Stewart also reported the account as deliquent to a collection agency. On October 8, 1981, Pinner attempted to purchase tires on credit but was refused after the tire company routinely consulted Chilton for Pinner's credit history. It was at this point that Pinner learned of the delinquent account report. Pinner then requested and received a copy of his credit report from Chilton showing his account as delinquent. He also received materials which explained the procedure to follow if he disputed any part of the report. On January 11, 1982, Pinner's attorney sent a letter to Chilton notifying them that Pinner disputed the accuracy of the Sherwin-Williams charges. The letter clearly set forth the dispute between

Pinner and Schmidt over the charge account and requested an investigation of the accuracy of the balance. Chilton employees contacted Sherwin-Williams and received verification from Schmidt that Pinner's account remained delinquent.

In February, 1982, Pinner was denied charge accounts by D.H.Holmes Company, Ltd., and Danny's Clothing Store. Both stores advised him in writing that the denials of credit were based on information they received from Chilton. Pinner again requested a copy of his credit report. The report he received, issued two months after his attorney's letter notifying Chilton that the account was disputed, still indicated that he had an undisputed delinquent account with Sherwin-Williams. In fact Chilton never amended Pinner's credit file to show the account balance was disputed. After suit was filed, however, Chilton noted in the file "Litigation Pending." The notation did not specify whether Pinner was plaintiff or defendant in the litigation.

Pinner sought recovery against Schmidt and Sherwin-Williams under La.Civ.Code Ann. art. 2315 (West Supp.1986) on several theories including damage to his creditworthiness and reputation and damages for humiliation and mental distress. Pinner also made claims against Sherwin-Williams for non-compliance with the Fair Credit Billing Act, 15 U.S.C.A. §§ 1666-1666j (West Supp.1986), and against Chilton for both negligent and willful violations of the Fair Credit Reporting Act (FCRA), 15 U.S.C.A. §§ 1681n and 1681o (West Supp.1986).

At trial the district court dismissed Pinner's claims based on the credit report he obtained after attempting to

buy tires. The court reasoned that Pinner's request was the first notice Chilton had received of Pinner's dispute with Sherwin-Williams. It also denied Chilton's motion for a directed verdict on the issue of punitive damages.

In response to a special interrogatory form, agreed upon by the parties, the jury returned a verdict finding that: (1) Schmidt was at fault in a way that caused damage to the plaintiff; (2) Sherwin-Williams was at fault in a way that caused damage to the plaintiff; (3) Chilton negligently failed to observe the requirements of the FCRA; (4) Chilton willfully failed to observe the requirements of the FCRA; (5) fair and adequate compensation to be awarded to the plaintiff for his actual damages was $100,000; and (6) punitive damages whould be assessed in favor of plaintiff against Chilton in the amount of $100,000.

Although the claims were under both Louisiana and federal law, neither side requested the jury to apportion the judgment to specify what aspect of the award was attributable to each defendant. The trial judge entered a judgment holding Schmidt, Sherwin-Williams and Chilton liable in solido for the $100,000 compensatory damages.[2] Chilton alone was cast for $100,000 punitive damages. Each defendant filed a motion for judgment notwithstanding the verdict or alternatively for a new trial or a remittitur, 617 F.Supp. 342. The motions were denied. This appeal followed.

---

[2] In the absence of a demand by the parties that an issue be submitted to the jury and if such an issue is omitted, Fed.R.Civ.P. 49(a) allows the court to make its own findings on the omitted issue. See *Taherzadeh v. Clements*, 781 F.2d 1093, 1100 (5th Cir.1986).

II. CHILTON'S LIABILITY UNDER THE FCRA

Congress, in enacting the FCRA, sought to require consumer reporting agencies to adopt reasonable procedures for meeting the needs of commerce for consumer credit in a manner both fair and equitable to the consumer. 15 U.S.C.A. § 1681(b). The legislative history of the FCRA indicates that its purpose is to protect an individual from inaccurate or arbitrary information about himself in a consumer report that is being used as a factor in determining the individual's eligibility for credit, insurance, or employment.

[1] The facts of this case present two possible bases of liability under the FCRA. First, the FCRA provides that in preparing a consumer report a credit reporting agency must "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C.A. § 1681e(b). This section imposes a duty of reasonable care in the preparation of a consumer report. *Thompson v. San Antonio Retail Merchants Association*, 682 F.2d 509, 513 (5th Cir. 1982). Second, the FCRA imposes a duty upon reporting agencies to reinvestigate and to delete information found to be inaccurate or no longer verifiable once the consumer has protested the inclusion of the material. 15 U.S.C.A. § 1681i.[3] A negligent violation of either of these

---

[3] §1681i(a) provides:

> If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless

sections subjects the credit reporting agency to liability for any actual damages sustained as a result of the violation, together with the costs of the action and a reasonable attorney's fee. 15 U.S.C.A. § 1681o. A willful violation of either section subjects the agency to punitive damages as well. 15 U.S.C.A. § 1681n.

Our review of Chilton's appeal from denials of motions for directed verdict and judgment notwithstanding the verdict is governed by the standard set forth by this court in *Boeing Co.v. Shipman*, 411 F.2d 365 (5th Cir.1969):

> On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper.

411 F.2d at 374.

[2] In assessing motions for new trial or remittitur the court is called upon to determine whether the verdict is excessive or contrary to the weight of evidence or has resulted in a miscarriage of justice. *Brazile v. Bisso Marine*

(footnote 3 continued)
it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

Co., 606 F.2d 101, 105 (5th Cir. 1979), *cert. denied*, 449 U.S. 829, 101 S.Ct. 94, 66 L.Ed.2d 33 (1980).

[3] The record reveals evidence from which a jury could find a negligent violation of § 1681i. Once Chilton received notice of the dispute over the Sherwin-Williams account from Pinner's attorney it was obligated to re-verify the accuracy of the delinquent entry. The letter informed Chilton of the Pinner-Schmidt dispute. It was unreasonable for Chilton to contact only Schmidt in its reinvestigation.

The Sixth Circuit has held that where a credit agency knew of a dispute between the consumer and creditors and where the consumer had complained about his consumer report, merely making two telephone calls to the creditors was insufficient to re-verify the information contained in the report. *Bryant v. TRW, Inc.*, 689 F.2d 72, 79 (6th Cir. 1982). Here, Chilton not only called the creditor to re-verify the report but consulted the man they knew to have had disagreements with Pinner in the past. Because of Schmidt's involvement, contacting only him was insufficient to reverify the entry as Chilton was required to do under § 1681i(a). If, as Chilton argues, there was no other authority to turn to to verify Pinner's account, Chilton should have deleted the information altogether, as is required by § 1681i(a).

[4] Turning to liability under § 1681e(b), any person could easily have construed the notation "Litigation Pending" as an indication that the plaintiff was being sued by Sherwin-Williams, while the actual situation was the reverse. It would have been a simple matter to prevent this ambiguity, particularly in light of Chilton's knowledge of Pinner's dispute with Sherwin-Williams. As the court

noted in the well-reasoned opinion of *Alexander v. Moore & Associates, Inc.*, 553 F.Supp. 948, 952 (D.Hawaii 1982), *quoted in Swoager v. Credit Bureau of Greater St. Petersburg*, 608 F.Supp. 972, 977 (M.D.Fla. 1985):

> [§ 1681e(b)] does not require a consumer reporting agency follow reasonable procedures to assure simply that the consumer report be "accurate," but to assure "maximum possible accuracy." Otherwise it would seem that a consumer reporting agency could report that a person was "involved" in a credit card scam, and without regard to this section fail to report that he was in fact one of the victims of the scam. This result cannot have been contemplated under the Act.

608 F.Supp. at 977

In determining liability under the FCRA "[T]he standard of conduct by which the trier of fact must judge the adequacy of agency precedures is what a reasonably prudent person would do under the circumstances." *Thompson*, 682 F.2d at 513. The evidence suffices to show that Chilton's procedures did not meet this requirement.

We have carefully considered each argument presented by Chilton with the premise that our assigned role is neither to re-try the case de novo nor to supplant the jury verdict so long as it is supported by substantial evidence. We find that the district court was eminently correct in denying Chilton's motions for directed verdict, or a new trial in regard to negligent violations of the FCRA.

We can see nothing in this fact situation, however, to justify a finding that Chilton willfully violated the Act.

Punitive damage awards are permitted even without malice or evil motive, but the violation must have been willful under 15 U.S.C.A. § 1681n. *Fischl v. General Motors Acceptance Corporation*, 708 F.2d 143 (5th Cir. 1983). In each case where punitive damages have been allowed the defendant's conduct involved willful misrepresentations or concealments. In *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976) punitive damages were found to be proper when the agency sought at every step to block the consumer in his attempts to exercise his rights under the FCRA. There, the agency misled the consumer about the contents of his credit file on three separate occasions. The reports it issued were "rife with innuendo, misstatement, and slander," and the agency did not reveal the contents of the credit file until the commencement of litigation. 528 F.2d at 834. In *Collins v. Retail Credit Co.*, 410 F.Supp. 924 (E.D.Mich. 1976) the agency's report contained statements about the plaintiff regarding her excessive drinking and "alleged instances of low moral character." 410 F.Supp. at 927. The agency also refused to disclose the contents of her file on at least one occasion. *Id.*.

[5] Chilton's conduct in this case in no way resembles the actions of the defendants in *Millstone* and *Collins*. Chilton promptly furnished Pinner with a copy of his credit report when he requested one. No effort was made to conceal anything and the information contained in the credit file was limited to the report on the delinquent Sherwin-Williams account. There was unrefuted testimony from Chilton employees establishing that they attempted to contact Pinner's attorney to relay that Chilton had reaffirmed the accuracy of his credit history. The telephone calls were not returned. Under the plain language and legislative history of § 1681n, punitive damages are

appropriate only where the violation has been willful. "Willful" is a word of many meanings—its construction often influenced by its context. But here there is simply nothing to even suggest that Chilton willfully set out to do Pinner harm. There is no evidence that they knowingly and intentionally committed an act in conscious disregard for the rights of others. The jury's award of punitive damages lacked any evidentiary support whatsoever. The facts and controlling case law mandate that the punitive damage award be vacated. It is.

III. LIABILITY OF SCHMIDT AND SHERWIN-WILLIAMS

Since neither the jury nor the district court specified the legal theory upon which Schmidt and Sherwin-Williams were found liable, we examine the evidence under each of Pinner's claims.

[6] Beginning with Sherwin-Williams, it is clear that it could not have been held liable for a violation of the Fair Credit Billing Act, 15 U.S.C.A. §§ 1666-1666j (West Supp. 1986). That Act provides a procedure through which a debtor can dispute statements containing a billing error issued by a creditor. To trigger the creditor's obligation to reinvestigate and verify the billing, the debtor must give written notice of the specific dispute within sixty days of receipt of the statement. 15 U.S.C.A. § 1666(a). Pinner first notified Sherwin-Williams of his objection to his statement on March 13, 1981; he had received the statement on December 20, 1980. As the sixty day notice period begins to run when a disputed statement is first received, Pinner did not complain about the erroneous statement within the applicable time period and Sherwin-Williams' obligations

under the Act were not triggered. *See Gray v. American Express Co.*, 743 F.2d 10, 14-15 (D.C.Cir. 1984).

[7] Pinner's claim against Sherwin-Williams under La.Civ.Code Art. 2315 (West Supp. 1986)[4] is essentially an action in defamation. To maintain an action in defamation, the following elements must be proved: (1) defamatory words; (2) publication; (3) falsity; (4) malice, actual or implied; and (5) resulting injury. *Cangelosi v. Schwegmann Brothers Giant Super Markets*, 390 So.2d 196, 198 (La.1980). Truth or substantial truth is a defense to a defamation suit. *Baste v. Guiteau*, 413 So.2d 559 (La.App. 1st Cir. 1982); *Rosen v. Capital City Press*, 314 So.2d 511 (La.App. 1st Cir. 1975).

[8] We find no support for Pinner's contention that Sherwin-Williams communicated false information to Chilton. Pinner's argument that the information was erroneous as to the amount of the debt is unconvincing. The record clearly shows that Pinner had a delinquent account with Sherwin-Williams in the amount of $121.71. A potential creditor checking with Chilton would only be concerned with whether or not the account was delinquent, not with whether the balance was $171.11 or $121.71. The evidence reveals that the information presented to the Credit Bureau by Sherwin-Williams and Schmidt that plaintiff owed money was substantially correct.

[9] There appear to be three acts for which Schmidt could be found liable under Article 2315: (1) Schmidt's alleged statements to two ladies that Pinner was using

---

[4] Article 2315 provides in pertinent part; "A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it".

illegal drugs, was wanted by the F.B.I., and that his life was in danger, (2) Schmidt's alleged placing of fictitious charges on Pinner's account; and (3) Schmidt's confirmation of Pinner's account as deliquent when Chilton checked with him following receipt of the letter from Pinner's attorney.

Any claim arising out of the first of these acts is barred by the time limitations of La.Civ.Code Ann. art. 3492 (West Supp. 1986), which provides: "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained." The statements were made while Pinner was still an employee, which was prior to December, 1980. Any damage was sustained at that time. This lawsuit was not filed until March, 1983, over two years later.[5]

As to the fictitious entries on Pinner's account, the record contains no proof that they were made. The plaintiff introduced no evidence whatsover to indicate that Sherwin-Williams' determination that Pinner owed them $121.71 was not correct. The $49.40 difference between $171.11 and $121.71 represents a credit for merchandise returned by one of Pinner's customers. At trial Sherwin-Williams admitted that Pinner was entitled to this credit. Every penny of the balance was thus accounted for.

Finally, as we have already noted, the information conveyed by Sherwin-Williams to Chilton regarding the

---

[5] The remarks allegedly made were not broadcast and the young ladies and plaintiff remained intimate friends. The issue was not pressed upon us. There is no suggestion that these isolated remarks were the basis of any jury finding.

status of Pinner's account was substantially correct. Schmidt simply confirmed the accuracy of that information when contacted by Chilton employees. Any action against him based on this act is thus defeated by the defense of substantial truth. *Batiste,* 413 So.2d 559.

Our review of the record reveals no evidence to support liability against Schmidt or Sherwin-Williams. We reverse the district court's denial of motions for judgment notwithstanding the verdict on the part of Schmidt and Sherwin-Williams.

IV. DAMAGES

All appellants contend that the jury award for compensatory damages was grossly excessive and must be set aside. Even giving due deference to the fact finding role of the jury and the role of the trial court in declining to set aside the award, we must agree. "Surely, there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." *Martell v. Boardwalk Enterprises, Inc.,* 748 F.2d 740, 750 (2nd Cir.1984).

[10] The plaintiff produced no evidence of any monetary damages. He testified that he was embarrassed by his denial of credit and sustained deep emotional distress because of Chilton's negligence. The evidence is far from sufficient to justify an award of $100,000. Despite the excessiveness of the award, however, we believe it is appropriate for us to order a conditional remittitur so as to avoid, if possible, a second trial. *Peters v. T.G. & Y. Stores Company,* 707 F2d 227 (5th Cir.1983). *Howell v. Marmpegaso Compania Naviera,* S.A., 536 F.2d 1032 (5th Cir.

1976). Our power to fix remittiturs is the same as that of the trial court. *Shingleton v. Armor Velvet Corporation*, 621 F.2d 180, 182 (5th Cir.1980). Moreover, as we said in *Davis v. Safeway Stores, Inc.*, 532 F.2d 489, 491 n. 4 (5th Cir.1976), "an appellate court that finds a verdict excessive may give plaintiff the choice between a new trial and a remittitur in a specified amount." *Accord, Stapleton v. Kawasaki Heavy Industries, Ltd.* 608 F.2d 571, 574 at n. 7 (5th Cir.1979). In determining the amount of a remittitur, we are guided by the "maximum recovery rule" of this circuit which permits reduction of the verdict only to the maximum amount the jury could properly have awarded. *Keys v. Lauga*, 635 F.2d 330 (5th Cir. 1981). There is no evidence to show that Pinner suffered any out-of-pocket expenses. Pinner testified that he was embarrassed and humiliated about the credit denials from several retail stores. This should support an award of some damages. However, the last time Pinner was denied credit was in February of 1982. This was after Pinner's attorney sent the letter advising Chilton that Pinner disputed his account but before Chilton noted "Litigation Pending" in his credit file. Pinner surely suffered a substantial measure of temporary public humiliation. Plaintiff readily concedes that he subsequently received a $150,000 SBA loan, a boat loan and a car loan and that his gross income from his own business in 1984 was more than a million dollars.

The jury award must be assigned to the more speculative damage elements of future embarrassment or loss of earning capacity or punishment. The amount is simply not "in the ball park" on the evidence in this record. *See Thompson*, 682 F.2d at 513-14; *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir.1976); *Bryant v. TRW, Inc.*, 689 F.2d 72 (6th Cir. 1982).

We do not regard these cases as setting a maximum on a plaintiff's permissible recovery for humiliation and embarrassment, but only as providing guidance as to levels of recovery that are realistic rather than fanciful.. In light of the excessiveness of the compensatory damage award, the judgment against Chilton is reversed and remanded for a new trial on the issue of damages alone, unless plaintiff is willing to remit all compensatory damages in excess of $25,000. Plaintiff's decision is to be made within a time to be fixed by the district court on remand. The award is to bear interest from date of the original judgment entry. The attorney's fee award against Chilton remains. Chilton is to pay costs below and of this appeal.

In summary: As to Chilton, we reverse and render as to the punitive damage award; we affirm the judgment appealed from as to compensatory damages, except as to the amount of those damages. We find $25,000 to be the maximum possible recovery for those damages and order a conditional remittitur. We reverse as to Schmidt and Sherwin-Williams.

AFFIRMED IN PART, REVERSED IN PART AS TO CHILTON with conditional REMITTITUR. REVERSED AS TO SCHMIDT AND WILLIAMS.

IN THE UNITED STATES COURT OF APOPEALS
FOR THE FIFTH CIRCUIT

No. 85-3524

F I L E D
FEB 10, 1987

THOMAS K. PINNER,
Plaintiff-Appellee,
Cross-Appellant,

versus

JAMES J. SCHMIDT, THE SHERWIN—WILLIAMS COMPANY and CREDIT BUREAU SERVICES-NEW ORLEANS, d/b/a/ CHILTON CORPORATION, ETC., ET AL.,

Defendants-Appellants,
Cross-Appellees.

- - - - - - - - - - - -

Appeals from the United States District Court for the Eastern District of Louisiana

- - - - - - - - - - - -

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 18, 5 Cir., 1986,_____F.2d_____)
(FEBRUARY 10, 1987)

Before GEE and HILL, Circuit Judges, and Hunter*. District Judge..

* District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having bveen polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also Denied.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR
STAY OF THE MANDATE.
REHG-7

ENTERED FOR THE COURT

United States Circuit Judge FEB 6 1987

APPENDIX B

Thomas K. PINNER

v.

James J. SCHMIDT, the Sherwin-Williams Company, and C.B.M. of Louisiana, Inc. d/b/a Credit Bureau Services—New Orleans.

Civ. A. No. 84-2059

United States District Court,
E.D. Louisiana.

Sept. 3, 1985.

Consumer brought action against account holder and manager of store owned by account holder for damage to his credit worthiness and reputation and for humiliation and mental distress, against account holder for non-compliance with Fair Credit Billing Act, and against credit bureau service for negligent and willful violations of federal Fair Credit Reporting Act. Following a jury verdict in favor of the consumer, defendants moved for judgment notwithstanding the verdict, new trial or remittitur. The District Court, Charles Schwartz Jr., J., held that: (1) evidence supported the finding that credit bureau service was liable under the Fair Credit Reporting Act for willful noncompliance and negligent noncompliance with the Act, and (2) ample evidence supported innumerable types of intentional and negligent fault on part of holder of consumer's account and manager of store owned by holder.

Order Accordingly.

1. Federal Civil Procedure 2610

In assessing motions for judgment notwithstanding the verdict, district court is called upon to determine whether there is complete absence of proof on issues material to plaintiff's causes of action or whether there are controverted issues of fact upon which reasonable minds could differ.

2. Federal Civil Procedure 2609

In assessing motions for judgment notwithstanding the verdict, district court must review evidence in light most favorable to party against who motions are made.

3. Federal Civil Procedure 2331, 2339

In assessing motions for new trial or remittitur, district court is called upon to determine whether verdict is excessive or contrary to weight of evidence or has resulted in miscarriage of justice.

4. Federal Civil Procedure 2313

Motions for new trial or remittitur are directed to district court's discretion.

5. Libel and Slander 44-(4)

Qualified immunity granted by Fair Credit Reporting Act [Consumer Credit Protection Act. §§ 616, 617, as amended, 15 U.S.C.A. §§ 1681n, 1681o] as to defamation and other types of tort actions was not triggered where no claims were furthered against credit bureau service under LSA-C.C. art. 2315 for intentional tort.

6. Credit Reporting Agencies 4

Evidence that credit bureau service failed to clarify status of consumer's account to specify that consumer was suing holder of account, which normal person could easily have construed as indication that consumer was being sued by holder of account, supported finding of liability of credit bureau service under Fair Credit Reporting Act [Consumer Credit Protection Act, §§ 616, 617, as amended, 15 U.S.C.A. §§ 1681n, 1681o] for willful noncompliance and negligent noncompliance with Act.

7. Credit Reporting Agencies 3

Credit bureau service's duty to exercise reasonable care in preparation of credit reports, arising under 15 U.S.C.A. § 1681e(b), extends to updating procedures, because preparation of consumer report should be viewed as continuous process with obligation to insure accuracy with every additional item of information. Consumer Credit Protection Act. § 607(b), as amended, 15 U.S.C.A. § 1681e(b).

8. Credit Reporting Agencies 4

In light of credit bureau service's actual knowledge of consumer's dispute with holder of consumer's account regarding certain charges, there was ample evidence that credit bureau service did not satisfy its obligations, under 15 U.S.C.A. § 1681e(b), to exercise reasonable care in preparation of credit reports including updating. Consumer Credit Protection Act, § 607(b), as amended, 15 U.S.C.A. § 1681e(b).

9. Credit Reporting Agencies 4

There was ample basis for jury to have concluded that credit bureau service did not act reasonably in connection with its reinvestigation of consumer's credit history, where consumer disputed certain charges to his account, particularly where matters at issue could easily have been remedied by amending consumer's credit history. Consumer Credit Protection Act, § 607(b), as amended, 15 U.S.C.A. § 1681e(b).

10. Credit Reporting Agencies 3

Requirement of direct communication to consumer reporting agency of consumer's dispute with information contained in his file is intended merely to distinguish reporting dispute to store or business whose account is in question from reporting it to credit reporting agency. Consumer Credit Protection Act, § 607(b), as amended, 15 U.S.C.A. § 1681e(b).

11. Credit Reporting Agencies 4

Evidence that credit bureau service failed to clarify status of consumer's account, which consumer disputed, to specify that consumer was suing holder of account, rather than reverse, that account holder's errors gave rise to dispute, and that consumer was thereby damaged, supported jury verdict awarding the consumer actual damages of $100,000 and punitive damages against the credit bureau service of $100,000.

12. Credit Reporting Agencies 4

Ample evidence supported innumerable types of intentional and negligent fault on part of holder of consumer's account and manager of store owned by holder, where there were various accounting errors in respect to consumer's accounts, and account holder admitted such errors at trial. LSA-CC. art. 2315.

13. Credit Reporting Agencies 4

Fact that consumer's complaint charged holder of his account and manager of store owned by account holder with "tortious conduct" and did not specifically urge "negligence" action did not mean that jury should not have been allowed to decide question of defendants' negligence.

14. Credit Reporting Agencies 4

It was appropriate for jury to resolve remaining issues of causation and damages as to any negligent acts of holder of consumer's account and manager of store owned by holder, where they had not stipulated to liability arising from various errors in regard to consumer's account.

15. Interest 65

Consumer could not be awarded pre-judgment interest under Louisiana law where consumer presented claims under both Louisiana and federal law, but did not request jury to apportion judgment to specify what aspect of award was attributable to state law claims.

16. Federal Civil Procedure 2737.5

Consumer was entitled to additional award of attorney fees for time expended to oppose motion of credit bureau service for judgment notwithstanding the verdict, new trial, or remittitur after jury verdict in favor of consumer in his action against credit bureau service for negligence and willful violations of Federal Fair Credit Reporting Act. Consumer Credit Protection Act §§ 616, 617, as amended, 15 U.S.C.A. §§ 1681n, 1681o.

Edward K. Pinner, Sr., New Orleans, La., for plaintiff.

Ralph Alexis, III, Wm. Porteous, New Orleans, La., for Schmidt and Sherwin-Williams.

Harry A. Rosenberg, Taryn A. Southon, New Orleans, La., for Chilton Corp.

ORDER AND REASONS IN CONNECTION WITH POST TRIAL MOTIONS AND JURY CHARGES

CHARLES SCHWARTZ, Jr., District Judge.

This matter is before the Court upon alternative motions of defendants for judgment notwithstanding verdict, new trial or remittitur. For the following reasons, the motions are denied. Plaintiff's motion to amend the judgment to award pre-judgment interest is also denied. However, the Court awards the plaintiff attorney's fees incurred in defense of Chilton's motion, and the previously entered judgment shall be amended accordingly. The judgment

shall also be amended to correct the inadvertent omission of the jury's verdict on the indemnity claim between defendants Chilton Corporation and Sherwin-Williams. Each motion shall be addressed in turn, and where pertinent, the Court will also provide reasons in support of certain of its charges to the jury.

At all relevant times, plaintiff was a salesman assigned to work at a Gentilly paint store owned by defendant Sherwin-Williams and managed by defendant James E. Schmidt. The evidence showed that considerable tension developed between the plaintiff and Schmidt, attributable to, inter alia, social and business rivalry. This tension culminated in a dispute regarding plaintiff's Sherwin-Williams store charge accounts; simply stated, plaintiff challenged the accuracy of certain charges reflected on his accounts. There was such ill-will existing between Schmidt and plaintiff as to cause plaintiff to suspect that certain charges were fictitious and that Schmidt caused those charges to be made. Ultimately, relations between plaintiff and Schmidt deteriorated to the point of Schmidt's circulating malicious gossip about the plaintiff and engaging in other equally immature behavior.

Whatever precipitated the dispute pertaining to the plaintiff's accounts, the evidence showed at a minimum various accounting errors in respect of the accounts, and Sherwin admitted to such errors at trial. However, Sherwin refused to document the accounts when they were challenged by the plaintiff and reported the accounts as delinquent to both a collection agency and to defendant Chilton d/b/a Credit Bureau Services, notwithstanding plaintiff's objections to the amounts due and owing.

The presence of adverse information in plaintiff's credit history did not come to plaintiff's attention until November 1981, when plaintiff requested and received copy of his credit history from Chilton, showing one of his Sherwin accounts as delinquent and placed for collection. Chilton was thereupon notified in writing by plaintiff's attorney on January 11, 1982 that plaintiff disputed the accuracy of the Sherwin charges. This notice clearly and briefly set forth the dispute between the parties and requested amendment of the credit report. As this was Chilton's first notice of the dispute between plaintiff and the Sherwin defendants, the Court directed a verdict in favor of Chilton and against plaintiff as to Chilton's liability for actions taken by it prior to November 1981.

However, Chilton thereafter consistently refused to clarify its reporting of the status of the dispute between the parties to reflect clearly that plaintiff challenged the Sherwin charges, a matter which could have easily been rectified by Chilton. See plaintiff exhibit 29 (Report of 3/30/82; Sherwin account "Placed for collection"); plaintiff exhibit 31 (Report of 3/31/84; Sherwin account showing "Dispute 5/83—Litigation pending"). In fact, neither the actual knowledge of the dispute afforded by plaintiff's counsel's letter, nor that afforded by Chilton's being joined as a party to this litigation was sufficient to move Chilton to adequately amend the matters set forth in plaintiff's credit report, and the evidence showed Chilton's reporting of plaintiff's credit history to have directly caused a denial of credit to the plaintiff.

As a result of this course of events, plaintiff sought recovery herein against Schmidt and Sherwin under article 2315 of the Louisiana Civil Code for damage to his

creditworthiness and reputation and for humiliation and mental distress. Plaintiff also made claims against Sherwin for its noncompliance with the federal Fair Credit Billing Act, 15 U.S.C. § 1666, and against Chilton for both negligent and willful violations of the federal Fair Credit Reporting Act [hereinafter "FCRA"], 15 U.S.C. §§ 1681n & 1681o. For alleged willful violations of the FCRA, plaintiff alleged punitive damages were owing.*

The matter came on for trial May 6-8, 1985, and in response to a special interrogatory form, agreed upon by the parties, the jury returned a verdict finding that (1) Schmidt was at fault in a way that caused damage to the plaintiff; (2) Sherwin was at fault in a way that caused damage to the plaintiff; (3) Credit Bureau Services (Chilton) negligently failed to observe the requirements of the FCRA; (4) Chilton willfully failed to observe the procedures of the FCRA; (5) fair and adequate compensation to be awarded to the plaintiff for his actual damages should be assessed in favor of plaintiff against the Credit Bureau in the amount of $100,000; and (7) Sherwin did not owe indemnity to Chilton for the amounts recovered by the plaintiff in this case, under the contract existing between Sherwin-Williams and Chilton.

[1,2] In assessing the motions for judgment notwithstanding verdict, the Court is called upon to determine whether there is a complete absence of proof on issues material to plaintiff's causes of action or whether there are controverted issues of fact upon which reasonable minds could differ. The Court must view the evidence in the light

---

* The case was originally filed in Civil District Court for the Parish of Orleans on March 15, 1983 and was removed to federal court upon defendants' joint petition, in light of the federal claims.

most favorable to the party against whom the motions are made. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1982); *Comeaux v. T.L. James & Co.*, 666 F.2d 294, 298 (5th Cir. 1982), *supplemented*, 702 F.2d 1023 (5th Cir. 1983) (per curiam).

[3,4] In assessing the motions for new trial or remittitur, the Court is called upon to determine whether the verdict is excessive or contrary to the weight of evidence or has resulted in a miscarriage of justice. *See Brazile v. Bisso Marine Co.*, 606 F.2d 101, 105 (5th Cir. 1979), *reh, denied* 613 F.2d 314 (5th Cir.), *cert. denied*, 449 U.S. 929, 101 S.Ct. 94, 66 L.Ed.2d 33 (1980). These motions are directed to the Courts discretion. *Id.*

After evaluating the evidence under the above standards, the Court is satisfied that defendants' motions must be denied.

The Court first stresses that if the matter had been tried without a jury, the Court would have found a willful and continuing violation of the FCRA based solely upon Chilton's continuing failure to clarify the status of plaintiff's Sherwin-Williams account to specify that the plaintiff was suing Sherwin-Williams. Any normal person could easily have construed Chilton's reporting as an indication that the plaintiff was being sued by Sherwin-Williams, while the actual situation was the reverse. It would have been a simple matter to prevent this ambiguity, particularly in light of Chilton's actual knowledge of the plaintiff's dispute against Sherwin-Williams. *See Bryant v. TRW, Inc.*, 689 F.2d 72, 78-79 (6th Cir. 1982) (citing Fifth Circuit standards); *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47,

51-52 (D.C. Cir. 1984) (cited by Chilton).

[5,6] In determining the standards applicable to claims made under the FCRA so as to charge the jury and evaluate the propriety of the jury verdict, the Court considered the specific claims here asserted under the FCRA against Chilton. Plaintiff's claims were made expressly under sections 1681n and 1681o of the FCRA. No claims were furthered against Chilton under article 2315 of the Louisiana Civil Code for intentional tort. Accordingly, the qualified immunity granted by the Act as to defamation and other types of tort actions was not triggered in this case, and the evidence presented was more than sufficient to support findings of liability under sections 1681n and 1681o.

[7,8] The Court also observes that Chilton's duty to exercise reasonable care in the preparation of credit reports, arising under section 1681e(b) of the FCRA, extends to updating procedures, because the preparation of a consumer report should be viewed as a continuing process with the obligation to insure accuracy with every additional item of information. *See Thompson v. San Antonio Retail Merchants Ass'n,* 982 F.2d 509 (5th Cir. 1982). There was ample evidence to show that Chilton did not satisfy its obligations in this regard, in light of its actual knowledge of plaintiff's dispute with Sherwin-Williams.

Another of Chilton's contentions, raised in the contexts of the motions for directed verdict and proposed jury charges, although not discussed in Chilton's post trial motions, was that plaintiff should be required to prove that Chilton acted with malice before punitive damages could be assessed. The Court rejected this contention, after

analyzing the claims asserted against Chilton in light of the rules set forth in *Fischl v. DMAC,* 708 F.2d 143 (5th Cir. 1983), wherein the Court stated that as to violations of the FCRA giving rise to punitive damages under section 1681n of the Act, "Malice or evil motive need not be established for a punitive damages award, but the violation must have been willful." *Id.* at 151 (citing *Thornton v. Equifax, Inc.,* 449 U.S. 835, 101 S.Ct. 108, 66 L.Ed.2d 41 (1980)).

The Court also rejected Chilton's contention that reinvestigation under section 1681i is not subject to a reasonableness standard, so long as the technical requirements of that section are met. In support of this argument, Chilton cited *Stewart v. Credit Bureau, Inc., supra,* 734 F.2d 47 (Court rejecting plaintiff's claim under 1681i on motion for summary judgment where he failed to return form submitted to him by credit bureau). This Court finds *Stewart* distinguishable on several grounds and thus does not consider itself bound by Chilton's reading of the case, *See id.* at 55, n. 13.

Among the distinguishing factors are that Stewart did not send **any** statement objecting to the report in question, which was an amended report reflecting the results of a reinvestigation. *Id.* at 50. Second, the jury here could have easily found Chilton's conduct did not adhere to the technical requirements of section 1681i in light of Chilton's apparent disregard of the letter from plaintiff's attorney, reflected by the credit report of March 1982

[9] Lastly, this Court finds Chilton's reliance upon *Stewart* misplaced inasmuch as the *Stewart* court did not in fact resolve the issue whether a reinvestigation must be reasonable once a duty to reinvestigate arises, because it

found that a reasonable reinvestigation occurred under the facts of that case. *See id.* at 55 n. 13. Accordingly, this Court does not read *Stewart* as holding that reinvestigation need not be reasonable and deems it appropriate to observe that there was ample basis for the jury to have concluded that Chilton did not act reasonably in connection with its reinvestigation of plaintiff's credit history, particularly where, as stated above, the matters at issue could have easily been remedied by amending plaintiff's credit history. *See also Koropoulos v. Credit Bureau, Inc.* 734 F.2d 37, 40 (D.C.Cir.1984) (Court balancing ambiguity in report against availability of clarifying information).

Chilton had also objected to the Court's charging the jury as to Chilton's duty to reinvestigate, asserting that section 1681i(a) of the FCRA triggers a duty to reinvestigate only when a dispute is directly conveyed to the consumer reporting agency by the consumer himself, in person. Thus, Chilton contends, the letter here submitted to Chilton by plaintiff's counsel falls short of a "direct" communication by the consumer and absolves Chilton of the duty to reinvestigate. The Court found these contentions wholly unacceptable and takes this opportunity to detail its reasons for rejection of Chilton's position.

The Court did not find any authority expressly discussing an attorney's authority to act for a client in this respect. However, in two cases which this Court finds persuasive, the failure of a consumer to act in person did not prevent consideration of his claims. *See Koropoulos v. Credit Bureau, Inc., supra,* 734 F.2d at 38 (Plaintiff's attorney obtained disclosure of plaintiff's credit file); *Dynes v. TRW Credit Data,* 652 F.2d 35 (9th Cir.1981) (Court interpreting duty to reinvestigate as a matter of first

impression; court holding defendant failed to fulfill duty to reinvestigate after consumer telephoned objection to amended report).

[10] Based upon these cases, common sense and an interpretation of the FCRA as a whole, this Court determines that the requirement of a direct communication is intended merely to distinguish reporting the dispute to the store or business whose account is in question from reporting it to the credit reporting agency governed by the FCRA provisions. It is inconceivable to the Court that an attorney could not represent a consumer in this regard, and the Court opines that requirements of direct communication elsewhere in the FCRA are intended only to protect the consumer by affording him a qualified confidentiality in the extensive information available from his credit files. *See* 15 U.S.C. §§ 1681b, 1681d.

[11] In finding that the evidence more than amply supports the quantum of damages awarded by the jury, the Court is guided by interpretations from the Fifth Circuit of the FCRA, stating, "Even where no pecuniary or out-of-pocket loss has been shown, the FCRA permits recovery for humiliation and mental distress, [citations omitted], as well as for injury to one's reputation and creditworthiness." *Fischl v. GMAC, supra,* 708 F.2d at 151; *Thompson v. San Antonio Retail Merchants Assoc.,* 682 F.2d 509, 513 (5th Cir.1982).

The parties did not request the Court to submit to the jury any interrogatories apportioning liability between the Sherwin defendants, who presented a joint defense, and Chilton. It is difficult for this Court to speculate which party's conduct the jury would have found more objectionable

and distressful to the plaintiff. In any event, the amounts awarded as both actual and punitive damages are far from shocking to the Court's conscience, particularly in light of the personal nature and implications of Schmidt's conduct and the principled and unyielding attitude taken by Chilton.

In connection with the quantum of punitive damages, the Court observes that punitive damages are intended to punish. Hopefully, the damages here assessed against Chilton will have some effect on Chilton's future conduct. A smaller amount might not so affect Chilton.

[12,13] The post trial motions of Sherwin and Schmidt are likewise denied. The plaintiff's claims against those defendants were made under article 2315 of the Civil Code. There was ample evidence to support innumerable types of intentional and negligent fault on the part of Sherwin and Schmidt. The Court is here constrained to add that it found totally baseless defendants' objections that the jury should not have been allowed to decide the question of defendants' negligence because the complaint charged defendants with "tortious conduct" and did not specifically urge a "negligence" action. The plaintiff's extensive pleadings and pre-trial memoranda exhaustively detailed the facts and issues to be decided at trial; and in the event of any deficiency, the pleadings would be deemed conformed to the evidence.

[14] Nor did Sherwin-Williams admissions of certain accounting errors in respect of plaintiff's accounts take any issues away from the jury. Defendants had not stipulated to liability and it was certainly appropriate for the jury to resolve the remaining issues of causation and damages as

to any negligent acts. Moreover, allegations of negligence were certainly within the scope of plaintiff's express reliance upon article 2315 for relief and were certainly included within the more serious allegations that defendants inflicted intentional and malicious injury.

[15] Plaintiff's motion for amendment of judgment to award pre-judment interest under Louisiana law is denied. Plaintiff presents claims under both Louisiana and Federal law, but plaintiff did not request the jury to apportion the judgment to specify what aspect of the award was attributable to the state law claims. Thus the Court is unable to determine the amount of the award upon which pre-judgment interest should run and is therefore prevented from entering such an award.

[16] However, plaintiff is entitled to an additional award of attorney's fees for the time expended to oppose Chilton's motion, and the Court hereby finds that plaintiff's counsel expended the time indicated in Appendix "B" attached hereto, for which compensation shall be allowed at the hourly rate of $100, for an additional award of $1440.00. See this Court's prior Order and Reasons of June 28, 1985 and Appendix "A" in respect of attorney's fees, which is incorporated herein as if set out in full. The Court also inadvertently omitted from the judgment the jury's verdict on the indemnity claim, and the judgment shall be amended accordingly. The Clerk of Court is hereby directed to amend the judgment to reflect the additional award and the denial of the indemnity claim.

APPENDIX B

This appendix recites the Court's line by line deter-

minations of recoverable time incurred by plaintiff in connection with his opposition to post trial motions filed by defendants, with each entry corresponding to the entries set forth in the affidavit of Edward K. Pinner, Sr., dated August 6, 1985, and submitted in support of plaintiff's supplemental claim for attorney's fees.

DATE	WORK PERFORMED	TIME/HOURS ALLOWED
July 8, 1985	Reading and studying Motion for Judgment Notwithstanding the Verdict, for a New Trial, and for a Remittitur filed on behalf of Chilton Corporation, and supporting memorandum	2.0
July 11, 1985	Study of legal memorandum of Chilton Corporation	1.5
July 11, 1985	Phone call from counsel for the Chilton Corporation	0.2
July 11, 1985	Phone call from Court personnel regarding Chilton Corporation	0.1
July 11, 1985	Phone call from counsel for the Chilton Corporation	0.1
July 15, 1985	Study of Motion to Stay and Memorandum filed in connection therewith by Chilton Corporation	0.4

July 16, 1985	Reading letter and motion to substitute bond sent by Chilton Corporation	0.1
July 19, 1985	Work on rough draft of memorandum in opposition to motions of Chilton Corporation	2.0
July 26, 1985	Study of motion for post verdict relief by Chilton Corporation and work on rough draft of memorandum	1.5
July 27, 1985	Study of Record in connection with motions by Chilton Corporation for post verdict relief	0.75
July 29, 1985	Reading cases cited by Chilton Corporation in their memorandum	1.0
July 31, 1985	Reading cases cited by Chilton Corporation in their memorandum	1.5
August 5, 1985	Composition of memorandum in opposition to Motions by Chilton Corporation for post verdict relief	1.75
August 6, 1985	Completion of composition of memorandum and preparation of this affidavit	1.5
	Total	14.40

APPENDIX C

SUBCHAPTER III—CREDIT REPORTING AGENCIES

I. Title 15, United States Code, Section 1681:

§ 1681. Congressional findings and statement of purpose

(a) The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4)There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

II. Title 15, United States Code, Section 1681e:

§ 1681e. Compliance procedures

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

III. Title 15, United States Code, Section 1681i:

§ 1681i. Procedure in case of disputed accuracy

Dispute; reinvestigation

(a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

Statement of dispute

(b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

Notification of consumer dispute in subsequent consumer reports

(c) Whenever a statement of a dispute is filed, unless

there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

Notification of deletion of disputed information

(d) Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.

IV. Title 15, United States Code, Section 1681o:

§ 1681o. Civil liability for negligent noncompliance

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under the subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

V. Title 15, United States Code, Section 1681s:

§ 1681s. Administrative enforcement

Federal Trade Commission; powers

(a) Compliance with the requirements imposed under this subchapter shall be enforced under the Federal Trade Commission Act by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act and shall be subject to enforcement by the Federal Trade Commisssion under section 5(b) thereof with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement

powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this subchapter and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter. Any person violating any of the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this subchapter....

APPENDIX D

N/101-20373536/M/D/A
BU-NEW ORLEANS, LA. ID # 101-20373536

I PINNER, THOMAS KILLEEN
SSN 438-76-1170
CA04 4836 WARREN DRIVE, NEW ORLEANS, LA. 70127
CE01 SHERWIN-WILLIAMS, H06/78 SALES REP

FA03 200 DILTON, NEW ORLEANS, LA. S03/83
FA02 10605 JEFF, NEW ORLEANS, LA. S01/83
FA01 4217 HESSMER, METAIRIE, LA. S04/82

FILE 06/78 A03/13/84

D Firm Name Identity Code	Type Terms	Reported Method	Open Paid	High	Owes	Past Due	Payments Late Hist 30/60/90+
1 Sherwin Willm LP-101-----5557 Acct ‡654955467 Dispute-05/83-Litigation Pending	I	05/27/83V	12/81	500	193	193	See Comment*
1 First Prog Bk BB-101-----4777	I 130	10/24/79M	06/79 10/79	4712	4188	00	--- 00/00/00
1 Sherwin Willm LP-101-----5559 Acct ‡711855882	I	10/24/79M	00/77 00/79	400	30	00	--- 00/00/00
2 Credico Finan FP-101-----6222 Br-4106 Acct ‡410108120721503	I	04/13/82A	10/81 02/82	86	00	00	000-0

D Firm Name Identity Code	Type Code	Reported Method	Open Paid	High	Owes	Past Due	Payments Late Hist 30/60/90+
1 Non-Mbr Firm Z--99-----1 Rmks-Europa Hlth Spa	I 10	11/01/79M	09/79 10/79	158	105	00	--- 00/00/00
1 First Natl Bk BB-101-----576 Acct ‡10044300041626	I 212	03/10/84A	07/82 02/84	7654	3922	00	000000- 0000- 0000- 0000
1 First Bc CTR BC-101-----3663 Acct ‡4625250105079	R 10	03/08/84A	08/83 02/84	120	70	00	000
1 First Bc BC-101-----3663 Acct ‡53625250004835	R 13	03/08/84A	08/83 02/84	321	276	00	000
1 Bank New Orl BC-101-----4082 Acct ‡4638008041207 Rmks-Balance Transferred	R 10	03/20/82A	01/80 03/82	393	00	00	0000 00000-0- 0--0000 000000
1 Bank New Orl BC-101-----4082 Acct ‡4638008509617 Rmks-Balance Transferred	R 10	09/18/83A	04/82 08/83	288	00	00	000000 000000 00-00
1 Bank New Orl BC-101-----4082 Acct ‡5412790008017086 Rmks-Balance Transferred	R 16	10/16/83A	01/80 09/83	420	00	00	0-000000 0100 * 0---00 000000
3 Devineys CG-101-----6121 Acct ‡792529036941	R	03/04/84A	05/80 08/82	200	00	00	000000 00000- --00-0

1 Aldens R 7 01/05/83A 10/79 490 00 00 000
QY-187------1120 11/82
Acct ‡163665847

Inquirer Name	KB-BUR-GP-CODE	Inq Date
1 Amer Express	Nz-187-------569	03/13/84
1 Radiofone	Pz-101------4411	02/14/84
1 Natl BK Comm	Bb-101------2820	11/10/83
1 First BC Ctr	Bc-101------3663	09/16/83
1 First NBC Bk	Bb-101------4562	03/30/83
1 Southern Sav	Fg-101------1867	03/03/83
1 Ames Taping	Kg-127------9032	12/06/82
1 General Motor	95-08032742	07/02/82
1 First Natl Bk	Bb-101-------576	06/07/82
1 Anserphone	Zz-101------6189	04/28/82

Info1 11/81 Copy Mailed to Subject 11-23-81 in New Orleans, La
Info2 03/82 Copy Mailed to Subj 3/31/82 in New Orleans, LA
End ‡101-20373536

SO
I L095-FAT - SIGNED-OUT

APPENDIX E

FEDERAL TRADE COMMISSION

15 U.S.C. §1681i

FCRA §611

(Jan. 31, 1985)

[Although a consumer reporting agency must reinvestigate a disputed item contained within its credit report and delete any item that cannot be verified, the verification need not include signed sales slips reflecting sales on credit accounts with department stores. Additionally, reasonable procedures to maintain maximum accuracy are satisfied when a credit bureau reflects that an account has been charged off, but repaid at a later date.]

This responds to your letter dated December 26, 1984, in which you state you had disputed entries in your credit file at _____ relating to three accounts with _____. _____reinvestigated the three items and received confirmation from the creditors, but you were not satisfied with their response. Also, you questioned your rating of "R9" on your _____ account, even if the balance was shown in your _____ credit file as paid off.

As you know, the Fair Credit Reporting Act (the Act) was designed to protect consumers against the circulation of inaccurate or obsolete credit information. Enclosed for your information is a copy of that Act and a brochure that explains it more fully.

Section 611 of the Act provides the procedure to be

followed when you dispute the accuracy or completeness of information in your file, which procedure you used with _____. If information in your file is inaccurate or incomplete, you may tell the credit bureau that a dispute exists regarding a particular item or items of information. Then, within a reasonable period of time, the credit bureau must reinvestigate the item or items, unless it has reasonable grounds to believe that the dispute is frivolous or irrelevant. If the information in question is found to be inaccurate or incomplete, or it can no longer be verified, the credit bureau must correct that information or delete it from your file. If the reinvestigation does not resolve the dispute, you may file a brief statement setting forth your version of the dispute. If the information is deleted, or you file a statement of dispute, the credit bureau, at your request, must give notice of the charge or of the statement to anyone who has received a report on you during the previous six months.

The language in section 611 of the Act requires that the credit bureau "reinvestigate" a disputed item of information, and delete the information if it "can no longer be verified." It does not suggest, as you do, that documentation such as the actual signed sales slips reflecting a transaction must be produced by the creditor for verification purposes. Business such as _____ customarily retain their account information on ledger sheets; they rely upon the information to prepare their tax and securities filings, and are prepared to vouch for the accuracy of such ledger information in a court of law. It seems equally reasonable to permit a credit bureau to rely upon this customarily accepted evidence of accuracy when it attempts to verify disputed information in a credit bureau

file. Therefore, it is my opinion, based on the "notification of current status"_____provided you (which you attached to your letter), that the bureau properly reinvestigated your dispute of each of these three accounts on September 11, 1984.

Although your dispute has not been resolved to your satisfaction, you are not wholly without relief. Under the provisions of section 611 of the Act, you may insert in your file a brief statement setting forth the nature of your dispute regarding any or all of these accounts, and have this statement disseminated to past and future recipients of your credit report.

In regard to your complaint about_____ report your_____account, *if* they revised your file to show the debt as paid (that is, a balance of zero), they have satisfied the Act's requirement that a credit bureau maintain reasonable procedures to insure the accuracy of its reports. (I am not clear from your letter and attachments whether_____in fact changed the balance from $62 to $0, to accurately reflect_____response to their reinvestigation.)_____reported that it had charged off the account but that you paid it off at a later date, and a credit bureau report that reflects both facts (the charge-off, and the later payment) would accurately reflect _____report of your account, in my opinion.

The Federal Trade Commission does not represent consumers to resolve disputes between them and credit bureaus, but takes action only on behalf of the public generally. However, the Act provides for a private right of action on the part of individual consumers to redress

damages. If you believe that the credit bureau is in violation of the Act, you may wish to consult a private attorney. The private enforcement provisions of the Act permit the consumer to bring a civil suit for willful noncompliance, in which case punitive damages in any amount may be sought (section 616). The consumer may also sue for negligent noncompliance and recover actual damages sustained because of the violation (section 617). Attorney's fees as determined by the court, will be awarded to a consumer who is successful in any lawsuit brought under the Act. Incidentally, if you are considering legal action against any of the creditors involved, you should note that section 610(e) of the Act grants a qualified priviledge to companies that report information to a credit bureau.

The foregoing comments reflect informal staff opinion which is not binding on the Commission.

If you have any questions about the Fair Credit Reporting Act or its application to your situation, please feel free to call me at 724-1143.

Sincerely yours,

Clarke Brinckerhoff, Attorney
Division of Credit Practices
Federal Trade Commission

* Federal Trade Commission's Interpretation of §611, 42 U.S.C. §1681i, printed in Fair Credit Reporting Manual by Ralph C. Clontz, Jr. (1986 Cumulative Supplement).